



UNIVERSITY
OF CALIFORNIA
LOS ANGELES

SCHOOL OF LAW
LIBRARY

This book is DUE on the last date stamped below

MAY 23 1932

OCT 17 1932

OCT 30 1950

OCT 30 1950



Digitized by the Internet Archive
in 2008 with funding from
Microsoft Corporation

UNIVERSITY OF CALIFORNIA
LIBRARY
LOS ANGELES, CALIF.



S. BLATCHFORD

LIBRARY OF CONGRESS
SOUTHERN BRANCH

CYCLOPEDIA OF LAW

Negotiable Instruments
and Principal and Surety

INCLUDING

A FULL DISCUSSION OF THE ORIGIN AND HISTORY
OF COMMERCIAL PAPER, BILLS OF EXCHANGE,
PROMISSORY NOTES, AND THE LAW OF
GUARANTY AND SURETYSHIP, WITH
STATUTORY MODIFICATIONS OF
THEM WHICH OBTAIN IN
MANY STATES

VOL. VI

EDITOR IN CHIEF

HON. CHARLES E. CHADMAN, LL.B., LL.M., LL.D.

Assisted By

A CORPS OF LEGAL EXPERTS

PUBLISHERS

AMERICAN SCHOOL OF LAW

CHICAGO, U. S. A.

36344

T
C3447c
1906

COPYRIGHT, 1906
BY FREDERICK J. DRAKE & CO.
CHICAGO

C107

C 3 A
V. 6
cop. 1

ary

AUTHORITIES CONSULTED.

E. S. ABBOTT,
Municipal Corporations.

W. A. ALDERSON,
Judicial Writs and Processes.

W. C. ANDERSON,
Law Dictionary.

W. F. BAILEY,
Personal Injuries.

F. H. BACON,
Life Insurance.

J. B. BISHOP,
Statutory Crimes.

G. T. BISPHAM,
Principles of Equity.

M. M. BIGELOW,
Life and Accident Insurance.

E. C. BENEDICT,
American Admiralty.

C. F. BEACH,
Modern Equity Practice.

AUTHORITIES CONSULTED

E. E. BALLARD,
Real Property Law.

S. E. BALDWIN,
American Railroad Law.

W. E. BENJAMIN,
Bills, Notes and Checks.

W. BLICKENSDECKER,
Students' Review.

J. H. BREWSTER,
Conveyancing.

W. BLACKSTONE,
Commentaries.

G. BLISS,
Life Insurance.

H. C. BLACK,
Constitutional Problems.

C. L. BATES,
Federal Equity Procedure.

W. H. BROWNE,
Law of Trade Marks.

H. F. BUSWELL,
Personal Injuries.

F. M. BURDICK,
Partnership.

AUTHORITIES CONSULTED

A. M. BURRILL,
Assignments.

J. BOUVIER,
Law Dictionary.

I. BROWNE,
Domestic Relations.

S. V. CLEVINGER,
Spinal Concussion.

G. A. CLEMENT,
Fire Insurance.

J. C. CHITTY,
Contracts.

C. D. DRAKE.
Attachment Suits.

G. B. DAVIS,
Military Law.

M. E. DUNLAP,
Elementary Law.

E. S. DRONE,
Copyright Law.

R. T. DEVLIN,
Law of Deeds.

C. B. ELLIOTT,
Public Corporations.

AUTHORITIES CONSULTED

F. GIAQUE,
Notary's Manual.

S. GREENLEAF,
Evidence.

W. E. HAGAN,
Disputed Handwriting.

A. M. HAMILTON,
Medical Jurisprudence.

G. E. HARRIS,
Damages by Corporations.

J. G. HAWLEY,
International Extradition.

E. W. HUFFCUT,
Negotiable Instruments.

J. L. HIGH,
Injunctions.

F. N. JUDSON,
Interstate Commerce.

J. A. JOYCE,
Damages.

J. D. LAWSON,
Contracts.

J. R. LONG,
Domestic Relations.

AUTHORITIES CONSULTED

S. S. MERRILL,
Mandamus.

J. W. MAY,
Law of Crimes.

G. L. PHILLIPS,
Code Pleading.

R. R. PERRY,
Common Law Pleading.

J. H. PURDY,
Private Corporations.

H. E. PAINE,
Law of Elections.

F. POLLOCK,
Contracts.

J. N. POMEROY,
Municipal Law.

J. RAM,
Legal Judgments.

J. J. REESE,
Toxicology.

W. C. ROBINSON,
Elementary Law.

W. H. RAWLE,
Covenants for Title.

AUTHORITIES CONSULTED

W. C. RODGERS,
Domestic Relations.

H. D. SEDGWICK,
Law of Damages.

J. SCHOULER,
Personal Property.

C. H. SCRIBNER,
Dower.

G. SHARSWOOD,
Law of Lectures.

W. L. SNYDER,
Mines and Mining.

G. H. SMITH,
Elements of the Law.

A. A. STEARNS,
Suretyship.

J. F. STEPHENS,
Digest of Evidence.

H. TAYLOR,
International Law.

C. G. TIEDEMAN,
Real Property.

B. M. THOMPSON,
Equity Pleading.

AUTHORITIES CONSULTED

H. C. UNDERHILL,
Criminal Evidence.

G. W. WARVELLE,
Abstracts of Title.

W. P. WILLEY,
Procedure in Pleadings.

F. WHARTON,
Law of Negligence.

W. WINTHROP,
Military Law.

T. A. WALKER,
American Law.

J. H. WIGMORE,
Examinations in Law.

J. G. WOERNER,
American Guardianship.

PREFACE.

This volume is the sixth number of the Cyclopedia of Law, and treats of two quite important branches of law—the law of Negotiable Instruments, and the law of Suretyship and Guaranty. These subjects lie at the very basis of Commercial law, and contain most of the principles governing the every-day affairs of business men.

Many bulky books covering these subjects have been compiled suitable for practitioners. This little volume the author has designed as a simple and helpful handbook for the use of students, business men, notaries, and those who desire the general and essential principles of law, rather than an exhaustive and technical discussion of rules and cases.

It is needless to point out the prime importance of an accurate knowledge of the law of Negotiable Instruments and Suretyship to the business man of to-day, and yet how many are utterly ignorant of the important and well-settled rules governing these subjects, and are dependent upon professional advice whenever they would know their legal rights and obligations.

In this book it is attempted to set forth the fundamental and important principles of Commercial law, in reasonable compass, that all who wish may, at slight expense, become familiar with those rules which more or less pervade and control all commercial activities.

The Author takes this opportunity to thank the many patrons of the Cyclopedia of Law for their uniform kindness in appreciating his efforts in this attempt to epitomize and simplify the principles of law.

C. E. C.

Conneaut, Ohio, October 15th, 1901.

ABBREVIATIONS.

(SEE ALSO THE ABBREVIATIONS GIVEN IN PREVIOUS NUMBERS.)

- Admr., Admrs.—Administrator, Administrators.
Ads.—*Ad sectam*; at the suit of.
A. & E., or Ad. & El.—Adolphus and Ellis' Reports, English King's Bench.
B. & A., or B. & Ald., or Barn. & Ald.—Barnewall and Alderson's Reports, English King's Bench.
B. & P., or Bos. & Pul.—Bosanquet & Puller's Reports, English Common Pleas.
Barr.—Barr's Reports, Penna. Supreme Court., Pa. St. Vols. 1-10.
Benj.'s Chalmers B., N. & C.—Benjamin's Chalmers Bills, Notes and Checks.
Bing.—Bingham's Reports, English Common Pleas.
Bing. N. C.—Bingham's New Cases, Eng. Common Pleas.
Black (Ind.)—Black's Reports, Indiana Supreme Court, Ind. Reports, Vols. 30-55.
Bligh (H. L.)—Bligh's Reports, English House of Lords.
Brock.—Brockenborough's Reports, Marshall's U. S. Circuit Court Decisions.
Bush (Ky.)—Bush's Reports, Kentucky Court of Appeals.
C. B. N. S.—Common Bench Reports, New Series, English.
C. & K.—Carrington and Kirwan's Reports, English Nisi Prius.
Caine's—Caine's Reports, N. Y. Supreme Court.
Cal.—California State Reports, Supreme Court.
Car. & M.—Carrington and Marshman's Reports, Eng. Nisi Prius.
Cranch—Cranch's Reports, United States Supreme Court.
Co. or Co. Rep.—Coke's Report.
Cont. or Contra—*Contra*; to the contrary.
Conn.—Connecticut Supreme Court of Errors Reports.
Cold. or Coldw.—Coldwell's Reports, Tennessee Supreme Court.
Crompt. & Jer.—Crompton and Jervis's Reports, English Exchequer.
Dana—Dana's Reports, Kentucky Court of Appeals.
Day—Day's Reports, Connecticut Supreme Court of Errors, Conn. Reports, vols. 1-21.

ABBREVIATIONS.

Daniel or Daniel's Neg. Inst.—Daniel's Negotiable Instruments.

Den. or Denio—Denio's Reports, N. Y. Supreme Court and Court of Appeals.

Dev. & Bat.—Deveraux and Battle's Reports, North Carolina Supreme Court, law and equity.

Dillon, Mun. Corp.—Dillon's Municipal Corporations.

Eng. (Akr.)—English's Reports, Arkansas Supreme Court; Arkansas Reports, vols. 6-13.

Ex. or Exch.—English Exchequer Reports.

Et al.—*Et Alius*; and another.

Ex rel.—*Ex relatione*; upon the information.

Gray—Gray's Reports, Massachusetts Supreme Court; Mass. Supreme Court, vols. 67-82.

Gill and J. or Gill and John.—Gill & Johnson's Reports, Maryland Court of Appeals.

Harr. (Del.)—Harrington's Reports, Delaware Superior Court and Court of Errors and Appeals.

Haywood, (Tenn.)—Haywood's Reports, Tennessee Supreme Court of Errors and Appeals.

Heisk.—Heiskell's Reports Tennessee Supreme Court.

Hen. & Mum.—Hening & Mumford's Reports Virginia Court of Appeals.

Hilt.—Hilton's Reports N. Y. Common Pleas.

Hurl. & Gor.—Hurlstone & Gordon's Reports Eng. Exchequer.

Humph.—Humphrey's Reports Tennessee Supreme Court.

Id or idem.—The same.

L. J. C. P.—Law Journal New Series, English Common Pleas.

L. R.—Law Reports, Eng Chancery Appeal Case.

L. R. Q. B. D.—Law Rep. Queen's Bench Division Eng. Supreme Court of Judicature.

M. & M.—Moody & Malkin's Nisi Prius Cases, English Courts.

McCord L.—McCord's Law Reports, South Carolina Constitutional Court and Court of Appeals.

Mich.—Michigan Reports, Supreme Court.

Miss.—Mississippi Reports, High Court of Errors and Appeals, and Supreme Court.

Nat. or Natl.—National.

N. Y. S. C., or N. Y. Supr. C.—New York Supreme Court Reports.

Nott & M.—Nott & McCord's Reports, S. C. Constitutional Court.

Parson's N. & B.—Parson's Notes and Bills.

ABBREVIATIONS.

- Pen.—Pennington's Reports, New Jersey Supreme Court.
Penr. & Watts—Penrose and Watts' Reports, Penna. Supreme Court.
Rich. Law—Richardson's Law Reports, South Carolina Ct. of Appeals.
Rich. Eq.—Richardson's Equity Reports, S. C. Court of Appeals.
Sm. Lead. Cas.—Smith's Leading Cases.
Smith, E. D., or E. D. Smith—E. D. Smith's Reports, N. Y. Common Pleas.
Saund.—Saunders' Reports, English King's Bench.
Sandf. Ch.—Sandford's Chancery Reports, New York Chancery.
Sur. & Guar.—Suretyship and Guaranty.
Taunt.—Taunton's Reports, English Common Pleas.
Tiedeman, Com. Pap.—Tiedeman's Commercial Paper.
Tenn.—Tennessee Reports, Supreme Court.
Upp. Can.—Upper Canada Reports, Queen's Bench.
Va.—Virginia Reports, Supreme Court.
Vr. or Vroom—Vroom's Reports, N. J. Supreme Court and Errors and Appeals.
Wels. Hurl. & Gor.—Welsby, Hurlstone, and Gordon's Reports, English Exchequer.
Wils.—Wilson's Reports, Eng. King's Bench.
Willes—Willes' Reports, English Courts.
Wood's C. C.—Wood's U. S. Circuit Court Reports.
Y. & C.—Younge & Collyer's Reports, Exchequer Equity, English.
Yerg.—Yerger's Reports, Tennessee Supreme Court.
Zabr.—Zabriskie's Reports, N. J. Supreme Court and Errors and Appeals.

CONTENTS.

Preface.....	PAGE iii
Abbreviations	v

NEGOTIABLE INSTRUMENTS.

CHAPTER I.

The Subject Introduced and Defined.

Meaning of "Negotiable Instruments"	1
History of Negotiable Paper.....	3
Purpose Answered by Negotiable Instruments.....	5
Kinds of Negotiable Instruments	6
Bills of Exchange Defined.....	7
Usual Form of Bill of Exchange	8
Promissory Note Defined.....	9
Usual Form of Promissory Note	10
Check Defined.....	11
Essentials of Negotiability.....	12
Writers on Negotiable Instruments	13

CHAPTER II.

Essentials of Bills and Notes.

Must Be in Writing, Date, Signature	15
Same Subject—Designation of the Parties.....	18
Same Subject—The Payee.....	21
Must Be Payable in Money Only.....	24
Same Subject—Payable in Foreign Money	27
Same Subject—How, and Where Stated.....	28
Must Be for the Payment of a Sum Certain.....	29
Same Subject—Examples of Certainty as to the Sum Payable	30
The Sum of Money Must Be Payable without Conditions	32
Same Subject—"On or Before a Given Date"	35
Must Contain Words of Negotiability	36
Same Subject—Words of Negotiability, Examples of	37
Concerning the Consideration for the Note or Bill	38
Concerning the Place of Payment.....	39

CONTENTS.

	PAGE
The Effect of a Seal	40
Witnesses, Delivery, Etc.....	41
The Effect of Notes and Bills Executed in Blank	44
Words Sufficient to Constitute the Promise	45

CHAPTER III.

The Parties.

In General	47
Commercial Paper of an Infant Considered	48
Commercial Paper of an Insane Person Considered	49
Commercial Paper of Married Women Considered.....	50
An Alien Enemy Cannot Be a Party to Commercial Paper	51
Partners as Parties to Commercial Paper.....	52
Corporations as Parties to Commercial Paper.....	54
Same Subject— <i>Bona Fide</i> Holders	55
Same Subject—A Corporation Acts by Its Agents, Their Powers.....	56
Public or Municipal Corporations as Parties to Commercial Paper	58
Same Subject—How the Corporation is Bound, Signature of Agent.....	60
Trustees, Guardians, Etc., as Parties to Commercial Paper	62

CHAPTER IV.

The Consideration.

In General	65
What Constitutes a Valuable Consideration	65
Who Are Holders for Value	66
Who Are <i>Bona Fide</i> Holders for Value without Notice....	69
Same Subject—Accommodation Paper.....	71
Effect When Consideration Is not Given or Fails, Etc....	72
Fraud or Duress as Affecting the Consideration	75

CHAPTER V.

Acceptance and Transfer Considered.

The Purpose of Acceptance	77
The Meaning and Effect of Acceptance	77
Bills That Must Be Presented for Acceptance.....	78
Presentment, How Made.....	79
Presentment, When Excused.....	81
The Acceptance Considered	82
Acceptance for Honor, or <i>Supra Protest</i>	84
Presentment for Payment Considered.....	86

CONTENTS.

	PAGE
In What Ways Bills and Notes May Be Transferred.....	87
Transfer by Act of Law	88
Transfer by Assignment	88
Transfer by Negotiation, Its Meaning	89
Negotiation by Delivery and by Indorsement.....	90
Kinds of Indorsements	91
Qualified, Conditional and Restrictive Indorsements.....	91
Who May Negotiate a Bill.....	93
To Whom a Bill May Be Negotiated	93
When a Bill May Be Negotiated	94
Same Subject—Overdue Paper	94
Liability of the Indorser and Rights of the Indorsee	96

CHAPTER VI.

Duties of the Holder.

In General.	99
How to Ascertain the Proper Date for Presentment.....	99
Mode of Presentment.	100
Meaning and Purpose of Protest.....	100
"Noting" or Preparation for Protest.....	102
What the Certificate of Protest Should Contain.....	103
Protest Evidence of What Facts	104
How Protest May Be Waived or Dispensed with.....	105
Protest for Better Security	105
Meaning and Purpose of Notice.....	106
Meaning of "Due Notice," by Whom and When To Be Given	107
Notice Given By Others Than the Holder.....	113
When Notice of Dishonor is Unnecessary	114
Excuses for Delay in Giving Notice of Dishonor.....	116
Conflict of Law as Regards Notice.....	117
Duty of Holder to Accept Payment and Deliver Bill.....	117
Who May Make and Receive Payment.....	118
Effect of Payment Properly Made	118
Payment, How Appropriated When There Are Two or More Bills	120
Payment by Bill, When Considered Absolute or Condi- tional	120

CHAPTER VII.

Liabilities of Parties, and Special Forms of Discharges.

Liability as between Drawee and Drawer or Holder.....	123
Liability of Acceptor to Holder	124
Liability of Drawer or Indorser to the Holder	125

CONTENTS.

	PAGE
Same Subject—Exchange and re-Exchange Discussed....	127
Same Subject—Interest	129
Liability of Person Who Transfers by Delivery Only.....	129
Liability of Person Accommodated to Accommodation Party	130
What Will Operate to Discharge the Liability of Parties to a Bill or Note.....	131
Same Subject—When Surety Discharged	132
Same Subject—Forgery and Alterations as a Discharge...	132
Time within Which Suit May Be Brought on a Bill.....	135

CHAPTER VIII.

Promissory Notes and Checks Specially Considered.

Form and Interpretation of a Promissory Note	137
The Transfer of Promi-sory Notes.....	139
Liability of Maker of a Note.....	139
A Check Defined and Discussed.....	140
Certified Checks Discussed	142
Negotiability of Checks	144
Presentment for Payment and Protest of Checks.....	144
Same Subject—Time within Which Checks Must Be Pre- sented for Payment	145
Same Subject—When Check Is Deemed Overdue and Charges Holder with the Equities.....	146
Who May Draw Checks against Deposits	147
When a Check May Be Revoked.....	147
Rights and Duties of the Bank or Banker	148
Rights and Liabilities of Drawer of Check	151
Account Paid by Check not Discharged until the Check Is Paid.....	152

CHAPTER IX.

Paper Money, Coupon Bonds, and Quasi-Negotiable Paper.

Kinds of Paper Money and Effect as Negotiable Instru- ment	153
Coupon Bonds Defined and Explained	156
Transfer, Presentment for Payment of Coupon Bonds....	157
Actions on Bonds and Coupons, and Defenses on Municipal Bonds	159
Certificates of Deposits as Negotiable Instruments	160
Bills of Lading as Negotiable Instruments	161
Certificates of Stock as Quasi-Negotiable Instruments....	163
Warehouse Receipts as Quasi-Negotiable Paper	164
Letters of Credit and Circular Notes	165

CONTENTS.

PART II—THE LAW OF SURETYSHIP AND GUARANTY.

CHAPTER I.

The Contract Defined and Explained.

	PAGE
Suretyship and Guaranty Defined and Distinguished	167
General Requisites of the Contract, History and Authorities	170
Who May Become a Surety or Guarantor	170
The Consideration for the Promise of the Surety or Guarantor	171
Bond Given When not Required, or in Different Form Binds Surety	174
Surety May Be Bound Though Name not in Body of Writing, and His Obligation May Arise by Implication	175
When Joint Maker of a Note May Be Shown to Be a Surety by Parol Evidence	175
When Surety Estopped from Denying Recitals of Facts in Written Obligation	178
Negotiability of Guaranties Discussed	179
When Offer of Guaranty Must Be Accepted	180
Forms and Kinds of Guaranties	181
Limitations of Surety's Contract as Regards Time, Act or Amount	183
Effect of the Statute of Frauds upon the Contract	185
Same Subject—Effect When the Contract Is within the Statute and not in Writing	190

CHAPTER II.

Liability of Surety or Guarantor—How Discharged, Etc.

Construction of Contract of Surety or Guarantor	191
When the Surety May Be Sued	193
Same Subject—Meaning of Due Diligence	195
Liability of Surety for Payment of Overdue Notes and for Rent When Tenant Holds Over	196
Extent of Surety's Liability for a Debt or on a Bond	197
Liability of Surety on Discounted Note	197
Liability of Guarantor on General and Particular Guaranty	198
Liability of Guarantor or Surety in Special Cases	200
Revocation of Guaranty on Death of Guarantor, and by Notice	201

CONTENTS.

	PAGE
When the Surety May Be Sued Jointly with the Principal.....	202
Surety not Liable at Law, May or May not Be Chargeable in Equity	202
Contract of Surety Governed by Law of Place Where Made	203
Liability of Surety When Principal Discharged, or not Originally Bound.....	204
Necessity for Demand on the Principal and Notice of Default to Guarantor.....	205
Liability of Blank Indorsers and Accommodation Parties to Commercial Paper.....	207
Ways in Which Surety or Guarantor May Be Discharged	
Discharge of Surety or Guarantor by Payment	210
Discharge of Surety or Guarantor by Giving Time.....	211
Same Subject—Exceptions and Other Principles.....	214
Discharge of Surety or Guarantor by Alteration of the Contract.....	215
Discharge of the Surety or Guarantor by Fraud, Misrepresentation, Concealment, Etc.	217
Discharge of Surety or Guarantor by Creditor Relinquishing Security.....	219
Same Subject—Negligent Loss of Collateral Security.....	222

CHAPTER III.

Of the Rights of Securities and Guarantors—Contribution and Subrogation.

In General.....	225
The Right to Indemnity from the Principal	225
Same Subject—Other Principles.....	227
Rights of the Surety or Guarantor against the Creditor...	230
Rights of Surety or Guarantor against Third Persons ...	231
Of the Right to Contribution.....	231
Same Subject—Who Are Co-Sureties.....	232
Same Subject—Other Principles Concerning Contribution	235
Same Subject—Other Equitable Rights against Co-Securities.....	236
Subrogation an Equitable Right.....	238
Prerequisites to the Right of Subrogation.....	239
How the Right to Subrogation Enforced.....	240
When Subrogation Will Be Allowed.....	240
Same Subject—In Case of a Judgment.....	242
Extent of the Right of Subrogation	243
When Creditor Entitled to Securities Held by the Surety	245
Questions for Students	247

NEGOTIABLE INSTRUMENTS.

CHAPTER I.

THE SUBJECT INTRODUCED AND DEFINED.

Sec. 746. MEANING OF "NEGOTIABLE INSTRUMENTS."—By Negotiable Instruments, also called "negotiable paper" and "commercial paper," are meant that exceptional class of contracts or obligations in writing, which by the law merchant, commercial usage, and now by statute, may be assigned or transferred from person to person independent of the rules of the common law regarding assignments generally, and which when properly delivered or indorsed to another may enable that other, called the holder or indorsee, to sue upon it in his own name free from any defenses which the obligor might have against the original holder.*

*"Negotiable, describes that which is capable of being transferred by assignment, a thing which may be transferred by a sale and indorsement, or delivery. This negotiable quality transfers the debt from the party to whom it was originally owing to the holder, when the instrument is properly indorsed, so as to enable the latter to sue in his own name either the maker of a promissory note, or the acceptor of a bill of exchange, and the other parties to such instruments, such as the drawer of a bill or the indorser of a bill or note, unless the holder has been guilty of laches in giving the required notice. It must, however, be payable to order or bearer, and, at all events, in money only, and not out of any particular fund." (Abbott's L. Dict., "Negotiable," citing *Walker v. Ocean Bank*, 19 Ind., 247.)

In a previous volume of the *Cyclopedia of Law** we have seen that, at the early common law, contracts could not be assigned, the reason being that the right conferred by a contract is a right to sue, or a "chose in action," and to permit this action to be assigned was held to be an encouragement to litigation and not sanctioned by the wisdom of the law.** This rule, however, was not founded in reason, and has been outgrown. The equity courts, at an early date refused to recognize it, and the law courts have made it a mere technicality by allowing the assignee to sue in the name of the assignor but for his own use and benefit. By statutes in the various States permitting or declaring that all suits shall be brought in the name of the real party in interest, the rule of the common law regarding assignments of contracts is practically nullified. But from the earliest times, commercial, or negotiable paper, has been an exception to this common law rule, and has been transferrable from hand to hand with the right in the holder to sue in his own name, and hence they are very properly designated by writers as "negotiable" contracts.***

*Vol. IV., Secs. 472-479, under the subject of Contracts.

**"The great wisdom and policy of the sages and founders of our law have provided that by no possibility, title, right nor thing in action shall be granted to strangers, for that would be the occasion of multiplying contentions and suits of great oppression of the people." (Lord Coke, in *Lampet's Case*, 10 Co. Rep., 48.)

***Walker's Am. Law, Sec. 180. Under the present statutes requiring suits to be brought in the name of the real party in interest, the distinction between negotiable and non-negotiable instruments lies in the protection given to holders of negotiable paper against the equities existing between prior parties.

Sec. 747. HISTORY OF NEGOTIABLE PAPER.—There is some dispute as to the exact time when certain forms of negotiable paper began to be used. Bills of exchange were used by the Romans in the time of Cicero, but did not possess the negotiable characteristics of our bills of exchange. Similar bills of exchange were made use of by the Venetians prior to 1272, their origin being ascribed to the Jews when exiled from various countries for usury, enabling them to draw their wealth after them into countries where they were permitted to reside. The Lombards and Florentines are also given the credit of their invention, and further it is stated that they were employed by King John as early as 1202 to remit money to his agents at Rome. As a result of the various theories Mr. Parsons arrives at the conclusion that bills of exchange were "in use among the commercial nations of Europe, and especially along the shores of the Mediterranean, about five centuries ago, and that they were then of recent introduction."*

Inland bills of exchange, which are distinguishable from foreign bills, in being drawn and payable in the same country, were of later origin, and were first used in England about the reign of Charles II.** While promissory notes, though possibly used as evidence of obligations to pay money at an early day, were not recognized as negotiable by the

*J Parson's Notes and Bills, 2. See also in this connection, III Kent Com., 44; I Daniel's Negotiable Instruments, 4-5; Chitty on Bills, 11; Story on Bills, Secs. 5-11; II Bl. Com., 467.

**Tiedeman, Com. Paper, Sec. 3; Daniel's Neg. Inst., 8.

courts until inland bills of exchange began to be used, and were then confounded with inland bills. As a result of the opposition of Lord Holt, who declared in *Clerke v. Martin* (2 *Ld. Raym.* 757), "that the maintaining of these actions upon such notes were innovations upon the rules of the common law, and that it amounted to setting up a new sort of specialty unknown to the common law, and invented in Lombard Street, which attempted in these matters of bills of exchange to give laws to Westminster Hall," it became necessary to settle the matter of the negotiability of promissory notes by statute, as Lord Holt repeatedly denied that they could be declared upon as an inland bill under the custom of merchants.* By the statutes of 3 and 4 Anne, chapter 9, and 7 Anne, chapter 25, promissory notes were declared negotiable in England the same as bills of exchange.**

*See *Buller v. Crips*, 6 *Mod.*, 29; *Grant v. Vaughan*, 3 *Burr.*, 1525.

**By the statute of 3 and 4 Anne, ch. 9, it was enacted: "That all notes in writing that shall be made and signed by any person, etc., whereby such person, etc., shall promise to pay to any other person, his, her, or their order, or unto bearer, any sum of money mentioned in such note, shall be taken and construed to be, by virtue thereof, due and payable to any such person, etc., to whom the same is made payable; and also every such note payable to any person, etc., his, her, or their order, shall be assignable or indorsable over, in the same manner as inland bills of exchange are or may be, according to the custom of merchants; and that the person, etc., to whom such sum of money is or shall be by such note made payable, shall and may maintain an action for the same, in such manner as he, she, or they, might do upon any inland bill of exchange, made or drawn according to the custom of merchants, against the person, etc., who signed the same; and that any person, etc., to whom such note that is made payable to any person,

In the United States similar statutes have been enacted in the various States, and the negotiability of any note depends, it would seem, upon the statute having been complied with. But it is held by many authorities that promissory notes are negotiable independent of any statute by the custom of merchants, the contrary is also maintained by other authorities.*

Sec. 748. PURPOSE ANSWERED BY NEGOTIABLE INSTRUMENTS.—“Negotiable contracts were introduced in modern times for the benefit of commercial intercourse. They are designed to circulate readily from hand to hand, and thus multiply the facilities of traffic and credit.”** Professor Tiedeman states that the development and extension of commerce outgrowing the limited supply of money, as well as the danger from loss by robbery and destruction in the transportation of money, led to the invention and use of a representative of money—commercial paper—which possesses the characteristic of money in that it passes current and thus becomes a medium of exchange. It was

etc., his, her, or their order, is endorsed or assigned, or the money therein mentioned ordered to be paid by indorsement thereon, shall and may maintain his, her, or their action for such sum of money, either against the person, etc., who signed the note, or against any of the persons that indorsed the same, in like manner as in cases of inland bills of exchange.”

*Irwin v. Maury, 1 Mo., 194; Dunn v. Adams, 1 Ala., 527; 1 Parson's N. & B., 13, hold that they are negotiable independent of statute; while Davis v. Miller, 14 Gratt., 18; Morton v. Rose, 2 Wash. (Va.) 233, hold the contrary.

**Walker's Am. Law, Sec. 180.

the demands of commerce, he believes, that induced the courts to extend to commercial paper the character of money, and that this exchange quality is what distinguishes commercial paper from other instruments of indebtedness.* This contention is strengthened, if not proven, by the fact that as commerce and trade developed new forms of commercial or negotiable paper were invented, and this process of adding to the variety of instruments possessing the quality of negotiability has not ceased at the present time, though over nine-tenths of the volume of business is estimated to be conducted by this paper medium of exchange.**

Sec. 749. KINDS OF NEGOTIABLE INSTRUMENTS.—At common law, the first instrument recognized as possessing negotiable qualities was a foreign bill of exchange, which came into vogue and was sanctioned by the custom of merchants. This was followed by inland bills of exchange, and inland bills by promissory notes, whose negotiability was settled by the statute of 3

*See Tiedeman, Com. Paper, Sec. 1.

**This development of a paper currency in the face of the wise (?) policy of financiers and economists, who demand a money unit with intrinsic value equivalent to its face value, affords a striking example of the way in which the needs of trade and commerce force a modification of the law in the very teeth of the money sharks whose greed demands the limitation of the volume of money. Were it not for this commercial mint, in which untold millions of a practical and business-like exchange medium can be created independent of the gambling of the money sharks, humanity would long since have expired with a last quiver upon the "cross of gold!"

and 4 Anne, chapter 9. By State statutes, bills, notes and bonds are made equally negotiable, and in addition to these forms of negotiable instruments, checks, drafts, bank notes, coupon bonds, bills of lading, warehouse receipts, and letters of credit have been developed with all or some of the features of negotiable instruments.

Sec. 750. BILLS OF EXCHANGE DEFINED.

—A bill of exchange is defined by Blackstone to be "an open letter of request from one man to another, desiring him to pay a sum of money therein named to a third person on his account." (2 Com. 466.) Later definitions only improve on Blackstone by stating that the request must be unconditional, and the amount payable absolutely and at all events.*

Bills of exchange are either foreign, or inland. By a foreign bill of exchange is meant one drawn in one country and payable in another. While an inland bill of exchange designates one drawn and payable in the same State or country. If the bill is payable in a different State or country from that in which it is drawn, it is foreign; and if drawn and payable in the same State or country it is inland,

*Thus in Byles on Bills, 1, it is said, "a bill of exchange is an unconditional written order from A to B, directing B to pay C a sum of money therein named." While Mr. Daniel defines a bill of exchange as "an open letter addressed by one person to a second, directing him, in effect, to pay absolutely and at all events, a certain sum of money therein named, to a third person or to any other to whom that third person may order it to be paid; or it may be payable to bearer or to the drawer himself." (1 Daniel's Neg. Inst., 35. See also, Bayley on Bills, 1, and Tiedeman, Com. Paper, Sec. 2.)

regardless of the residence of the parties. (Buckner v. Findley, 2 Pet. 586.) The different States of the United States are regarded as foreign to each other, and a bill drawn in one payable in another is deemed a foreign bill. (Warren v. Crooms, 20 Me. 139.) The chief distinction between an inland and foreign bill is, that the former is construed and interpreted by the law of its origin, and need not be protested for non-payment, while the latter is construed by the law of the place of payment and must be protested in order to hold the drawer and indorsers.*

Sec. 751. USUAL FORM OF BILL OF EXCHANGE.—A bill of exchange is usually, though not necessarily, of the following form:

CONNEAUT, OHIO, April 1st, 1900.

Three months after date, pay to Abel Payee, or order, sixty dollars, for value received.

CHARLES DRAWER.

To Edward Drawee.**

“The person who makes this order (Charles Drawer) is called the Drawer; the one upon whom the order is drawn (Edward Drawee) is called the Drawee; and the person to whom the money is directed to be paid (Abel Payee) is called the Payee.” (Swan’s Treatise, 15th ed., p. 689.) The Drawee may accept the bill, which is done by writ-

*Tiedeman, Com. Paper, Sec. 3.

**This form, as well as several others which follow, are adapted from Swan’s Treatise, the Ohio Justice Guide, and are used because it is believed they will assist the student in identifying the respective parties to the bill.

ing the word "accepted" across the face of the bill and signing his name or initials thereto, and he is then called the Acceptor. And the Payee may indorse the bill, which is done by writing his name upon the back of the instrument and delivering it to some third person, he then becomes an Indorser as well as Payee; the party to whom he thus transfers the bill is called an Indorsee. The indorsee may in turn become an indorser by transfer of the note, and then sustains a double relation thereto, that of First Indorsee, and Second Indorser; the party to whom he has transferred becoming the Second Indorsee, and this process may continue through any number of indorsements. The last indorsee or party entitled to the bill is called the Holder.

Sec. 752. PROMISSORY NOTE DEFINED.—

"A promissory note is an unconditional promise to pay to another's order or to bearer a specified sum of money at a specified time."* It will be seen that a promissory note does not differ materially from an inland bill of exchange, with which it was early confounded. It is an order drawn on one's self instead of a third person.**

*Tiedeman, Com. Paper, Sec. 6. "A promissory note is an unconditional written promise, signed by the maker, to pay absolutely and at all events a sum certain in money, either to the bearer or to a person therein designated, or his order." (Benjamin's Chalmers B. N. & Checks, Art. 271; Colehan v. Cooke, [1742] Willes, 393-397.)

**"Indeed," says Professor Walker, "it is sufficient, so far as negotiability is concerned, to consider all negotiable instruments as divided into two classes, orders and promises: for a bill of exchange is a written order for the payment of money;

Sec. 753. USUAL FORM OF PROMISSORY NOTE.—The form of a promissory note, like that of a bill of exchange, is not arbitrary, so long as the essentials of a negotiable instrument are present. A customary form is as follows:

CONNEAUT, OHIO, April 1st, 1901.

For value received, I promise to pay Abel Payee, or order, sixty dollars, two months after date.

CHARLES DAMÉ.

"The one to whom the money is payable, still continues to be called the Payee; but the one who is bound to make payment is neither a drawer, drawee, nor acceptor; but the signer of the note is called the Maker, though his liability to the payee is precisely the same as if he had accepted an order, or bill of exchange, in favor of the payee." (Swan's Treatise, p. 690.)

The payee of the note may indorse it to a third person the same as a bill of exchange, and become both payee and first indorser, and this process may continue through any number of indorsers, the last party taking by indorsement being known as the Holder.*

which definition equally embraces checks, drafts, and orders commonly so-called: and a promissory note is a written promise for the payment of money, which definition equally embraces promises under seal, whether denominated bonds or single bills." (Am. Law, Sec. 180.)

* "In a bill, the person who makes the order is called the drawer; the person in whose favor it is made, the payee; and the person to whom the order is addressed, the drawee, and after acceptance, the acceptor. In a note, the person who makes the promise is called the maker; and the person to whom it is made, the payee. When the payee, either of a bill

Sec. 754. CHECK DEFINED.—A check is defined by Mr. Daniel as "a draft or order upon a bank or banking house, purporting to be drawn upon a deposit of funds for the payment at all events of a certain sum of money, to a certain person therein named, or to him and his order, or to bearer, and payable instantly on demand." (Neg. Inst., Sect. 1566.) While Professor Tiedeman describes a check as "having essentially the characteristics of a bill of exchange, and differing from the bill in being drawn on a bank or banker, apparently and presumptively against a deposit of funds, and payable on demand without grace." (Com. Paper, Sec. 430.)

A check is in the following form:

CONNEAUT, OHIO, April 1st, 1900.

The First National Bank, pay to Abel Payee, or order (or bearer), sixty dollars (\$60.00), and charge to my account.

CHARLES DRAWER.*

or note, has indorsed it to a third person, it is then said to be negotiated. He becomes the indorser, and the person to whom it is transferred, the indorsee. He may in his turn become the indorser, and so on indefinitely. The person having a right to the bill or note at any particular time is called the holder." (Walker's Am. Law, Sec. 180.)

* "A check is a written order or request addressed to a bank, or its cashier, and drawn by a person having money in the bank, requesting the bank, or its cashier, to pay on demand,—that is, on presentment,—to a person therein named, or to bearer, a named sum of money.

"The person who draws the check is called the drawer; the person upon whom it is drawn (the bank) is called the drawee; and the person to whom the money is directed to be paid is called the payee." (Swan's Treatise, p. 737.)

"A check is a bill of exchange drawn by a customer on his banker payable on demand." (Benj.'s Chalmers, B. N. & Checks,

Checks are negotiable instruments, and may be transferred by delivery when payable to bearer, or by indorsement when payable to any person or his order.

The other forms of negotiable or quasi-negotiable instruments mentioned in Sec. 749 will be discussed in their order in a later chapter.

Sec. 755. THE ESSENTIALS OF NEGOTIABILITY.—In order that written instruments may pass current or have the character and superior advantages accorded to commercial paper, they must bear certain indicia of their worth and nature upon their face. These requisites or essentials of negotiability are thus stated by Professor Walker: "First, it must be in writing; secondly, it must be for the payment of money only, and not for other property; thirdly, it must be for the payment of a sum certain, and not for unliquidated damages; fourthly, the sum promised must be payable absolutely, and without conditions; fifthly, the contract must contain words of negotiability, as 'to order,' 'to assigns,' or 'to bearer'; and sixthly, it must import a consideration, so as to preclude the necessity of inquiry and proof." (Am. Law, Sec. 180.) A contract possessing these properties Professor Walker states to be fitted for negotiation, since it is liable to no other question than what relates to the responsibility of the parties.

Art. 254. Citing, *McLean v. Clydesdale Bank* (1883), 9 App. Cas., 95; 21 Wend. (N. Y.), 372; *Bickford v. Bank* (1866), 42 Ill., 238.)

In the succeeding chapter we shall discuss, one by one, these essentials of negotiability, and explain their meaning in detail.

Sec. 756. WRITERS ON NEGOTIABLE INSTRUMENTS. — Mr. Daniel's noted work on Negotiable Instruments is a standard authority, and has reached the sixth American edition. Byles on Bills is a smaller work which has reached the eighth American edition. Among American authors are Story's work on "Promissory Notes"; Parsons' work on "Notes and Bills"; Ames' "Bills and Notes"; Randolph's work on "Commercial Paper"; Tiedeman's "Commercial Paper." Among the more recent writers are Bigelow, who has compiled a work styled "Bills, Notes and Checks"; Edwards' work on "Bills and Notes"; Hawthorne's "What Instruments Are Negotiable"; Van Schaak's "Bank Checks"; and Benjamin's Chalmers' "Bills, Notes and Checks."

CHAPTER II.

ESSENTIALS OF BILLS AND NOTES.

Sec. 757.—MUST BE IN WRITING, DATE, SIGNATURE.—A bill of exchange, promissory note, or other negotiable instrument must be in writing. There can be no verbal promise which is transferrable by delivery or indorsement. The bill or note may of course be printed, and even the signature of the drawer or maker may be printed, if it is proven that such printed signature has been adopted by the drawer or maker as his own signature. (*Pennington v. Baehr*, 48 Cal. 565.) The signature may also be written in pencil as well as in ink. (*Reed v. Roark*, 14 Tex. 329.) The signature of the maker need not be at the place indicated in the forms given, and is sufficient if it appears on any part of the paper, even the back. (*Hunt v. Adams*, 5 Mass. 359; *Schmidt v. Schmaelter*, 45 Mo. 502.) So it is held that the signature is sufficient though only the initials have been signed to the instrument. (*Merchants' Bank v. Spicer*, 6 Wend. 443.). To avoid ambiguity and suspicion of the validity of the instrument, it should be signed at the customary place, with the full name of the drawer or maker.*

A bill or note is usually dated at its commence-

* "A bill of exchange must be signed by the drawer. The drawer's signature may be added at any time, but until it is there the instrument is inchoate and without effect. A draws a bill on B, payable to drawer's order but does not sign it. B

ment, as in the forms given, and this is proper but not necessary.* Where the date is not given and the instrument is payable at a certain time after date, the time is computed from the date of issue, and parol evidence is admissible to show what this date was. (*Lean v. Lozardi*, 27 Mich., 424.) It may also be shown that there was a mistake in the date as against the maker, but not as against a bona fide purchaser without knowledge of the mistake. (*Huston v. Young*, 33 Me., 85.) An undated note or bill may be filled up by the payee, and any date inserted by him binds the maker or drawer when the instrument has been indorsed to an innocent purchaser for value; but in the hands of the payee, or holders with notice of the true date, it will be void if the date inserted is not the true date, unless authority has been given to change the date. (*Androscoggin Bank v. Kimball*, 10 Cush., 373; *Goodman v. Simonds*, 19 Mo., 106.)

Bills and notes may be antedated or post-dated without destroying their negotiability.** They may

accepts, and it is transferred for value to C. The instrument is neither a bill nor a note. (Benj.'s Chalmers Art. 4, *et seq.*; *McCall v. Taylor*, 34 L. J. C. P., 365.)

*It has been very generally held that the date is not essential to the validity of a bill or note. (Tiedeman, Com. Pap., Sec. 10. Citing, *Michigan Ins. Co. v. Leavenworth*, 30 Vt., 11; *Drake v. Rodgers*, 32 Me., 524; *Cowing v. Altman*, 71 N. Y., 441; *Seldenridge v. Connable*, 32 Ind., 375; etc.)

**"It is usual but not necessary, to insert in a bill the date on which it is drawn. A bill, expressed to be payable after date, should be dated; but evidence is admissible to show on what day such bill, if undated, was issued, and it takes effect from that time." (*Richardson v. Elett*, 10 Tex., 190.)

"A bill may be ante-dated or post-dated. Evidence is admis-

be negotiated before the day of the date without suspicion of invalidity. (Richter v. Selin, 8 Serg & R., 425.) And where the indorser died before the date set in a post-dated instrument, the indorsee was held to acquire the full title of the indorser. (Brewster v. McCardel, 8 Wend., 478.) The rights of the parties are determined with reference to the date actually stated in the note or bill as a general rule, but in case the note or bill would be void if it had been executed on that day, either because the maker was incompetent or the day precluded the making of valid paper, it can be shown in behalf of its validity that it was actually negotiated at a different date. But a bill post-dated or antedated for the very purpose of evading rules of law invalidating paper made on the day the paper is executed and delivered, will be void in the hands of all persons who have notice of the evasion or who take the paper without consideration.*

sible to show on what day such bill was issued, and it takes effect from that time. A draws a bill on B, bearing date May 1st, payable to C's order. C indorses to D, who sues A. It appears that C died in April. D may show that the bill was post-dated, and that C really indorsed it. He can then recover." (Benj.'s Chalmers B. N. & Checks, Arts. 15-16; Pasmore v. North, (1811), 13 East., 517.)

"Such evidence is not admissible to invalidate the title of a *bona fide* holder for value.

"A bill is *prima facie* presumed to have been issued on the day which it bears date. But a bill bearing date on a Sunday is not presumed to have been issued on that day." *Id.* Dohoney v. Dohoney (1870), 7 Bush (Ky.), 217.

*Tiedeman, Com. Pap., Sec. 12; Pasmore v. North, 13 East, 517; State Bank v. Thompson, 42 N. H., 369.

Note. "A bill issued on Sunday is not void at common

Sec. 758. SAME SUBJECT—DESIGNATION OF THE PARTIES.—The name of the maker of a note or the drawee of a bill should appear on the instrument. In the case of the note it is important as it is the maker who is liable thereon; and in case of the bill the drawer's name must be written in to bind the party accepting. (*Levis v. Young*, 1 Met. Ky., 199.)

In a case where the signature of the maker of a note was in the alternative as "A. B. or else C. D." it was held not to be a negotiable note within the statute of Anne, as against C. D., on account of his conditional liability. (*Ferris v. Bond*, 4 B. & Ald., 679.)

The execution and delivery of a bill of exchange without the signature of the drawer will be valid in two cases, first, where the payee is authorized to fill in the name, and second, where without authority the name has been filled in, and after acceptance passed into the hands of an innocent holder.

Instead of the name of the maker or drawer a description of the person sufficient to identify him will suffice, so a note signed "Steamboat Ben Lee

law, but by statutes in most of the States, resembling the 29 Car. 2, c. 7, a bill issued on Sunday is void between immediate parties, (*Sayre v. Wheeler* (1870), 31 Ia., 112) and incapable of ratification, but valid in hands of a *bona fide* holder for value, if dated on a secular day, either on the ground of estoppel, or because the statute does not declare the bill void to all intents and purposes. That the bill bears date on a Sunday, is immaterial if in fact issued on a secular day. The date of the bill, e. g. "March 6th, 1881, is itself notice to the holder of its issue on Sunday, as the almanac is part of the law of the land." (*Benj.'s. Chalmers B. N. & Checks*, Art. 17 note, citing *Knox v. Clifford*, 38 Wis., 651; *Vinton v. Peck*, 14 Mich., 287; *Finney v. Callendar*, 8 Minn., 41.)

and Owners," was held to be sufficiently executed. (*Sanders v. Anderson*, 21 Mo., 402.) In case of signature by mark it is customary to have witnesses to the mark of the signer, but this is for identification and not necessary to the validity of the signature; and the identification of the mark may be shown by its peculiarities the same as in the case of a signature. (*Flint v. Flint*, 6 Allen, 34; *Shank v. Butsch*, 28 Ind., 19.)

An agent may sign the name of the maker or drawer to a bill or note, and parol authority is generally sufficient for him to do so. (*Daniel's Negot. Inst.*, Sec. 274.)

A bill or note may be executed by one person or by a number of persons. When executed by but one, it is called a several note. When executed by two or more, it is either joint, or joint and several, according to its wording. Thus if in a note signed by two or more, the plural number is used in referring to them as "we promise to pay," it is held to be a joint note. (*Barrett v. Funay*, 38 Ind., 86.) While if in the same note the singular number is used, as "I promise to pay," then the note is considered as joint and several, since this expression indicates an intention to make it a joint and several note. (*Johnson v. King*, 20 Ala., 270.) So the expression, "we or either of us," is held to make a note joint and several. (*First Natl. Bank v. Fowler*, 36 Ohio St., 524.)

The distinction between a joint note, and one joint and several, results from the fact that at com-

mon law but one suit may be maintained on a joint note, and all the makers must be joined in it. While the holder of a joint and several note may sue all, or each of them singly, but not more than one and less than all. But under the modern statutes in most of the States, the common law rules respecting joint, and joint and several notes is changed so that suit may be brought against any number of the makers regardless of the wording of the instrument, hence the distinction is not of present importance.

The two or more drawers of a bill of exchange are treated as separate personages, unless they are partners, and are each entitled to the same notice of dishonor as a single drawer. Each is liable to the acceptor for the whole of the amount of the bill. (*Suydam v. Westfall*, 4 Hill, 211; *Swilley v. Lyon*, 18 Ala., 558.)

The drawee is a party to the bill, and his full name properly appears in the bill as indicated in the form given. But here, as in the case of the maker and drawer, the place given the name of the drawee is not important, neither is it required that the name should appear at all, if from the language used the identity of the drawee can be made out. Thus he may be identified by his description, official position, residence, and the like, and when accepted by the person intended is valid. (*Gray v. Milner*, 8 Taunt., 739.) Until accepted, a bill without the name of the drawee is invalid; though it is claimed if such a defective bill is accepted by any one, it

becomes valid, as the acceptor cannot deny that he was the intended drawee.*

The name of the drawee may be in the alternative as "to A, or to B," or "to A, and in case of need, apply to B." This simply necessitates that the holder should present the bill to each of the persons named as drawees before protest, and causes no uncertainty or conditional obligation as in the case of alternative makers or drawers. (1 Parsons' N. & B., 64, 65.)**

Sec. 759. SAME SUBJECT—THE PAYEE.—Every bill or note should specify clearly to whom it is payable. If no person is designated as payee the instrument cannot be negotiated, though if some one is indicated so as to be identified by parol evidence it may be good as a non-negotiable contract. (*Brown v. Gilman*, 13 Mass., 158; *Kinney v. Flinn*, 2 R. I., 319.) This does not mean that the payee must be actually named in the instrument, though

*Tiedeman, Com. Paper, Sec. 15; 1 Parsons' N. & B. 238-9; *Contra*, *Davis v. Clarke*, 6 Q. B. 16.

"Illustrations. Instrument in the form of a bill, but addressed 'To———, Mobile, Ala.' This is not a bill.

"Instrument in the form of a bill payable to drawer's order, not containing the name of the drawee, but expressed to be payable at 'No. 1. X Street, London.' B, who lives there, accepts it. This is a bill, and B is liable as acceptor." (*Benj.'s Chalmers B. N. & Checks*, Art. 5.)

**"A bill of exchange may designate one or more persons in addition to the drawee, to be resorted to for acceptance or payment in case of need, i. e. in the event of the bill being dishonored by the drawee. Such person is called the drawee or referee in case of need, or simply the case of need. The practice of designating a case of need is not common in America." (*Benj.'s Chalmers B. N. & Checks*, Art. 7.)

this is the proper way of doing. The instrument may be drawn payable to bearer, no name being given, and is negotiable as though executed to a named person, or bearer. The payee may be designated by his official capacity or office, or described as the administrator or executor of a deceased person, or the guardian or trustee of an infant.*

A note payable to a named person, there being two persons of the same name, father and son, is presumed to be payable to the father unless the

*Adams v. King, 16 Ill., 169; Moody v. Threlkeld, 13 Ga., 55; Tiedeman, Com. Paper, Sec. 17. "Or it may be made payable to the officer of a corporation or incorporated society; and without any further description, it will be payable to whoever occupies the office, at the time of presentment and demand, since the corporation or society was the real payee. But if the bill or note is payable to the officer of an unincorporated society, it must be made payable to the present occupant of the office, as payment 'to the secretary for the time being,' would make the paper void for uncertainty as to the payee." (Tiedeman, Sec. 17.)

"A bill may be expressed to be payable to a person therein designated, or to his order, or to bearer.

"Illustrations. Pay C.—Pay the trustees of the X. Chapel. —Pay to bearer C.

"Pay C. or order.—Pay to the order of C.

"Pay to bearer.—Pay to ship 'Fortune,' or bearer." (Benj.'s Chalmers B. N. & Checks, Art. 8.)

"The payee of a bill, not payable to bearer, must be an existing person capable of being ascertained and identified at the time it is issued. Extrinsic evidence is admissible to identify the payee when misnamed, or when designated by description only, but not to explain away an uncertainty patent on the bill.

"The following are valid:

"Pay to C, D and E, or the order of any two of them.

"Pay C or his agent.—Pay the trustees of the X Society, or their treasurer for the time being.—Pay C or his wife.

"Pay to C, the treasurer for the time being of the X Company.

"Pay to the administrator of X deceased. Evidence is

word "junior" is affixed to the signature. But where the son had possession of the note and had sued upon it a counter presumption arises which will permit the son to recover, unless it is shown that the father was intended. (*Stebbing v. Spicer*, 3 C. B., 827; *Sweeting v. Fowler*, 1 Starkie, 106.) And, as a rule, an ambiguity caused by a misdescription of the payee will not destroy the negotiability of the instrument if the payee can be identified by the aid of parol evidence. (*Cork v. Bacon*, 45 Wis., 192.) A note in the form, "Received of A. B. one hundred dollars, which I promise to pay on demand," was held to give a sufficient description of the payee, as from the receipt it is manifest that A. B. was the intended payee. (*Green v. Davies*, 4 B. & C. 235.)

Where the instrument is payable to a fictitious person or order, whose name has been indorsed on the back, the paper is treated as though it were payable to bearer in the hands of an innocent holder for value.* Such a holder may sue in his own name, the drawer or maker, and also the acceptor if admissible to show that C was administrator of X when the bill was issued.

"The following are invalid:

"Pay C or D, there being no apparent community of interest.

"Six months after date, pay to the treasurer for the time being of the C institution.

"Pay _____ or order. Evidence is inadmissible to show that C was intended to be the payee.

"Pay to the estate of X deceased. (*Benj.'s Chalmers B. N. and Checks*, Art. 9, and *Illustrations*.)

*This rule is statutory in some States. (See *Rev. Stat.*, N. Y., 768. *Rogers v. Ware*, 2 Neb., 29; *Lane v. Krekle*, 22 Ia., 404)

he had accepted knowing that the payee was a fictitious person. (3 Kent Com., 78.)

If the name of the payee or indorsee is left blank, any bona fide holder has authority to insert his own name as payee or indorsee. So if a note or bill is executed to the payee in a wrong name by mistake, he may sue in his right name and show the mistake at the trial. And the payee may assume a name different from his real name and the use of such adopted name honestly and in good faith will not invalidate the contract. (*Bartlett v. Tucker*, 104 Mass., 345.)

A note or bill may be made payable to the maker or drawer, and when endorsed and negotiated it becomes a valid negotiable instrument, and is treated as though it had been made payable to bearer. All bills in which the drawer and drawee are the same person may be treated by the indorsee as bills of exchange or promissory notes, and the drawer is not entitled to notice of dishonor.*

Sec. 760. MUST BE PAYABLE IN MONEY ONLY.—Another requisite of a negotiable instru-

**Chicago R.R. Co., v. West*, 37 Ind., 211; *Planters' Bank v. Evans*, 36 Tex., 592. "The most common instances of bills of exchange, where the drawer and the drawee are the same person, are those in which one member of a firm or corporation draws on a branch of the firm or corporation doing business in a different place; those in which an agent draws a bill upon his principal, with his authority; and those in which one officer of a corporation draws on another officer, who has the custody of the funds. In all these cases the paper may be treated as a bill or note at the option of the holder." (*Tiedeman, Com. Paper*, Sec. 20.)

ment is, that it must call for the payment of money only, and not for other property. Though all of the other features of negotiability are present and the paper calls for the payment of goods, or is in the alternative, as for the payment of a sum of money or "to issue stock" (*Hodges v. Shuler*, 22 N. Y., 114), payable in "foreign bills" (*Jones v. Fales*, 4 Mass., 245), payable "in ginned cotton at eight cents per pound" (*Lawrence v. Dougherty*, 5 Yerg., 435), to pay "fifty dollars, and deliver up a horse," (1 Stra., 127), it is not negotiable and becomes a mere contract.*

*“(1) The direction must be imperative, not permissive or precative; but the insertion of mere terms of courtesy will not make it precative.

“Illustrations: Mr. B. will much oblige Mr. A by paying C or order.—Valid.

“Please let the bearer have \$100. I will arrange it with you this noon.—Valid.

“Please let bearer have \$100, and you will much oblige me.—Invalid.

“We authorize you to pay C or order.—Invalid.

“(2) An order to pay out of a particular fund does not constitute a bill; but an absolute order to pay, coupled with (1) a direction to the drawee to reimburse himself out of a particular fund, or (2) a statement of the transaction which gave rise to the bill, is valid.

“Illustrations. The following orders or promises are invalid:

“Pay C or order \$100 out of the money in your hands belonging to the X Company.

“Pay C or order \$100 on the sale or produce when sold of the XX Hotel.

“Pay C or order \$100 and deduct the same from my share of the partnership profits.

“The following are valid:

“Pay C or order \$100, as my quarterly half-pay due 1st February by advance.

“Pay C or order \$100 and take the same out of our share of the grain.

Just what will be included in the word "money" is not always clear. Originally it was limited to the stamped metal or coin issued by a government. But now that paper issued by the government is declared legal tender, money properly includes all legal tender. Though the word "currency" is a broader term than money, and includes bank-notes which are not legal tender, yet it is held that certificates of deposit, notes, bills, bonds, checks and the like, payable in "currency," or in "current funds of this State," "Arkansas money," "current Ohio bank-notes," etc., constitute good commercial paper, and are really payable in money, as the term used is but a common expression used to indicate current legal tender.*

But if the instrument is made payable in the paper or currency of a particular bank, specifically and absolutely, and without reference to the currency or

"Pay C or order \$100 against cotton per 'Swallow.'

"(3) The order must require the payment of money.

"Illustrations: 'The following are not bills. An order for the delivery to bearer on demand of a certain quantity of iron. A promise to pay C or order \$100 in cotton; or in work and labor. A promise to pay in money or in property at the maker's option. Pay C or order \$100 in 'good East India bonds.''" (Benj.'s Chalmers B. N. and Checks, Art. 10.)

Note.—An order invalid as a bill or note may be valid as an equitable assignment of the fund or account to which it refers. (Bank v. Dubuque R. Co., (1879) 52 Ia., 378; Grant v. Wood, 12 Gray, 220.)

*Morris v. Edwards, 1 Ohio, 189; Graham v. Adams, 5 Ark., 255; Wilburn v. Greer, 6 Ark., 255; Howe v. Hartness, 11 Ohio St., 449; Pank v. Brown, 45 Ohio St., 39. Black v. Ward, 27 Mich., 173.

value of the paper, it is held not to be for the payment of money, and is not negotiable.*

It is no objection to negotiable paper that it calls for a special kind of legal tender, as "gold coin." (*Chrysler v. Pendis*, 42 N. Y. 209.) But the legal authorities are divided as to the negotiability of instrument payable in currency other than legal tender.**

Sec. 761. SAME SUBJECT—PAYABLE IN FOREIGN MONEY.—Negotiable instruments are not invalidated because the amount payable is expressed in money of the denomination of a foreign country. But a note is not negotiable which requires the obligor to tender money of the foreign denomination in payment instead of a like sum in the native denomination. As where the note is written in dollars and cents and made "payable in Canada money." (*Thompson v. Sloan*, 23 Wend. 71.) It is the equivalent value of the foreign money which is to be paid, and not the real foreign money.

All notes or bills made in the United States and calling for the payment of a designated number of dollars and cents are held to be negotiable, and to

**Hawkins v. Watkins*, 5 Ark., 481; *Bank v. Zadox Street*, 16 Ohio St., 1.

**That such expressions as "current funds," "bank-notes," "currency" and the like are the equivalent of "money," see *White v. Richmond*, 16 Ohio, 5; *Judah v. Harris*, 19 Johns., 144; *Drake v. Markle*, 21 Ind., 433; *Hunt v. Divine*, 37 Ill., 137; *Butler v. Paine*, 8 Minn., 324. To the contrary, see: *Collins v. Lincoln*, 11 Vt., 268; *Ford v. Mitchell*, 15 Wis., 304; *Rindskoff v. Barrett*, 11 Ia., 172; *Wright v. Hart*, 44 Pa. St., 454; *Johnson v. Henderson*, 76 N. C., 227.

be drawn for the stated amount of lawful money of the United States, and this presumption is as a rule conclusive against showing that some other denomination was intended. (*Cook v. Lillo*, 103 U. S., 793.) A noted exception however to this rule was made by the courts in the cases of instruments calling for the payment of a specific number of dollars and cents, but made within the lines of the Confederate government during the civil war and intended to be paid in Confederate money which was greatly depreciated. In order to do equity between the parties the presumption was relaxed, and the parties allowed to show that by dollars and cents the parties meant not "the lawful money of the United States," but a foreign money of a less value, the amount payable being determined by ascertaining the value of so much Confederate money at the time and place of the contract.*

Sec. 762. SAME SUBJECT—HOW, AND WHERE STATED.—As a rule the denomination of the money called for in the paper must be stated in the body of the note or bill, and not merely in the margin. Though where the denomination is not given in the body of the instrument, and is given by mark or symbol in the margin, it is held that a holder may write the denomination in the body of the paper. (*Tiedeman*, Sec. 29d; *Beardsley v. Hill*, 61 Ill., 354.)

**Tiedeman*, Com. Paper, Sec. 29c; *Stewart v. Solomon*, 94 U. S., 434. The Confederate Note Case, 19 Wall., 548. Its value is now fixed by statute.

Sec. 763. MUST BE FOR THE PAYMENT OF A SUM CERTAIN.—It is also a requisite to the negotiability of an instrument that it call for the payment of a definite and certain sum, and not for unliquidated damages. The amount to be paid or which the paper represents should be stated plainly on the face of the instrument, and like the denomination of the money must be stated in the body of the note or bill or it will be defective, unless it is purposely left blank and authority given or implied to fill it up. (*Norwich v. Hyde*, 13 Conn., 279.) The amount is customarily written in the margin also, but this is held to be no part of the instrument, and made simply for convenience of reference, and the statement in the body of the instrument controls, and should they vary any holder may change the marginal figures to conform to the amount as written in the body of the paper. (*Smith v. Smith*, 1 R. I., 398.) Unless required by statute to be written in words, the amount may be stated in the body of the instrument in figures. (*Petty v. Fleispel*, 31 Tex., 169.)

Unless the amount of the paper is definitely stated and made certain by the instrument it will not be negotiable. Reference to other papers cannot be made to make certain the amount called for by the instrument, but it is to be construed as a whole, and if from anything that appears on the face or back of the paper itself the sum is made certain, the instrument is negotiable. So a note giving the number of acres in a tract of land and the price per acre

agreed to be paid, was held negotiable. (*Smith v. Clopton*, [1849], 4 Tex., 109.)

Sec. 764. SAME SUBJECT—EXAMPLES OF CERTAINTY AS TO THE SUM PAYABLE.—By custom and usage instruments are written with appended statements or agreements which apparently make the amount payable uncertain, but which are held to be negotiable on the ground that the amount can be ascertained with certainty at the time of payment. Thus the note or bill may be written "with current exchange" on some money center. This means, in effect, that the maker or drawer agrees to pay in addition to the sum named the expense of transmitting the money to the stipulated place, and while this sum may vary from time to time it is not held to destroy the negotiability of the paper.*

In case the stipulation is to pay costs of collection, or a certain per centum for attorney's fees in collecting the note if not paid at maturity, the authorities differ as to the effect of this provision. "A few decisions maintain that the stipulation is in the nature of a usurious charge, and avoids the whole transaction under the laws prohibiting usury. Other decisions hold the stipulation to be void, as against public policy, because it is in the nature of a penalty, and tends to the oppression of impecunious debtors. But the avoidance of the stipulation on

**Pollard v. Herries*, 3 B & P., 335; *John v. Trisbie*, 15 Mich., 286; *Leggett v. Jones*, 10 Wis., 35; *First National Bank v. Dubuque, etc.*, R. R., 52 Ia., 378.

such grounds enables the courts to treat the stipulation as mere surplusage, and hold the instrument to be negotiable notwithstanding. In a large number of cases, the stipulation is held to be valid; but, because it renders the gross sum to be recovered on the instrument uncertain, its insertion in a bill or note is declared to destroy its negotiability; but there are also other cases, which not only recognize the validity of the stipulation, but also the negotiability of the paper, in which it appears."*

Akin to stipulations making the agreement uncertain as to the amount to be paid are those collateral obligations which are sometimes attached to an instrument calling for the performance of certain other acts on the part of the obligor. According to the earlier authorities all such stipulations were held to destroy the negotiability. Thus, paper for the payment of a sum of money and the performance of certain work (*Fletcher v. Thompson*, 55 N. H., 208), the payment of a stated sum and the settlement of other debts (*Ayrey v. Fearnside*, 4 M. & W., 168), and the payment of a certain sum for the hire of a negro, with a stipulation for the furnishing the negro with clothing (*Barnes v. Gorman*, 9 Rich.,

**Tiedeman*, Com. Paper, Sec. 28b. Citing, *State v. Taylor*, 10 Ohio, 378; *Meyer v. Hart*, 40 Mich., 517; *Sweeney v. Thickstun*, 77 Pa. St., 131; *Storr v. Wakefield*, 71 Mo., 622; *Overton v. Matthews*, 35 Ark., 147; *Johnson v. Crossland*, 34 Ind., 344, etc.

By statute in Indiana, it is provided that a stipulation in a negotiable paper to pay attorney's fees made to depend upon a condition in the instrument, shall be declared illegal and void. An unconditional stipulation is held not to be avoided by this statute. (*Brown v. Barber*, 59 Ind., 533.)

297), was held non-negotiable. But later decisions, contrary to earlier decisions, have held valid and negotiable paper stipulating that in default of payment the holder or his agent should have authority to confess judgment against the maker for the amount of the note. Instruments waiving the benefit of the exemption laws have also been held valid.*

Sec. 765. THE SUM OF MONEY MUST BE PAYABLE WITHOUT CONDITIONS.—A fourth requisite of commercial paper is that the sum of money promised must be payable absolutely and without conditions. The payment must be promised at a time certain or upon a condition that must happen, and not depend upon a contingent event. Thus where the paper was payable, provided a ship should arrive (*Coolidge v. Ruggles*, 15 Mass., 387), provided a railroad should be built to a certain point within a stated time (*Blackman v. Lehman*, 63 Ala., 547), or provided the maker was able (*Lalinas v. Wright*, 11 Tex., 572), the instrument was held non-negotiable because of the condition being contingent or uncertain. Any uncertainty or indefiniteness in the time of payment will destroy the negotiability of the paper, but if the condition upon which the note or bill is to be paid must happen in the ordinary course of events, however remote, the instru-

**Zimmerman v. Anderson*, 67 Pa. St., 421; *Walker v. Woolen*, 54 Ind., 164; *Contra*, *Overton v. Tyler*, 3 Barr., 346.

In Ohio, a note authorizing the holder to confess judgment, is called a "cognovit note," while a stipulation waiving the benefit of the exemption laws is rendered invalid by statute.

ment is negotiable. Thus a promise to pay when "A. B. dies," or on the first day of January, 2000, is a valid negotiable instrument, as the event stated must happen.*

So if the instrument is to be negotiable the amount must not be made payable out of a particular fund, but must be drawn absolutely for the payment of the stated amount by the maker or acceptor without reference to a special fund. Thus if the paper is written, payable out of a pension, out of stated funds when received, "provided A shall not pay it," "out of the net proceeds of certain ore," "on account of brick work done on a certain building," and the like, it is uniformly held to be non-negotiable.**

A drawer of the instrument may, however, indi-

**Coleman v. Cooke*, Welles, 393; *Worth v. Case*,² 42 N. Y., 362; *Conn v. Thornton*, 46 Ala., 587.

By a number of American authorities notes are allowed to be negotiable though plainly uncertain as regards time of payment, thus the promise, "payable from the avails of logs bought of A. B., when there is a sale made," (*Sears v. Wright*, 24 Me., 278); "as soon as I can," (*Works v. Hershey*, 35 Ia., 340); "to be paid as soon as collected from my accounts at P.," (*Ubsdell v. Cunningham*, 22 Mo., 124), have been held good as negotiable instruments. The English rule is quite different, and the United States Supreme Court holds such notes as non-negotiable, since the condition expressed may never happen. (*Nunez v. Dantel*, 19 Wall., 560. See *Tiedeman*, Com. Pap., Sec. 25b.)

**"In consequence of the uncertainty of payment which would result therefrom, it has invariably been held by the courts that a note or bill, payable out of a particular fund, is not negotiable, for the liability of the maker or drawer is conditional upon there being a fund." (*Tiedeman*, Com. Paper, Sec. 26, citing *Worden v. Dodge*, 4 Denio, 159; *Pitman v. Crawford*, 3 Gratt., 127; *Corbett v. Clark*, 45 Wis., 403; *Clarke v. Percenal*, 2 B. & Ad., 660.)

cate the source from which the drawee or acceptor may repay himself, without making the payment conditioned upon such fund, or relieving the acceptor of his absolute liability, and the bill will be negotiable. And in the same way a memorandum showing the nature of the debt which the instrument is to pay may be inserted without affecting its negotiability. Thus, a memorandum that if the instrument was not paid the insurance policy should be void (*Kirk v. Dodge Co., Mut. Ins. Co.*, 39 Wis., 138); that title should not pass until note was paid (*Heard v. Dubuque Bank*, 8 Neb., 16), and directing the drawee to "charge the same amount against whatever amount may be due me for my share of fish" (*Redman v. Adams*, 51 Me., 433) was held not to affect the negotiability of the paper.

When no time is mentioned for payment in the instrument it is construed to be payable immediately, as if written payable on demand, and the fact that the note is written with interest payable annually will not change this construction. (*Jones v. Brown*, 11 Ohio St., 601.) And parol testimony cannot be introduced to show that the parties intended a different time. Notes payable "when convenient," and the like expressions, are deemed payable in a reasonable time, where they are regarded as negotiable at all. (*Lewis v. Tipton*, 10 Ohio St., 88.) And those payable on demand, are considered due immediately without demand. This rule is different though if the instrument is payable a certain number of days after demand, demand is

then necessary to fix the time when the instrument is to come due. (*Insurance Co. v. Jones*, 35 Ohio St., 351.)

Sec. 766. SAME SUBJECT—"ON OR BEFORE" A GIVEN DATE.—In a few decisions a note or bill made payable "on or before" a stated date has been held non-negotiable, but the great majority of decisions declare them to be negotiable. In *Mattison v. Marks* (31 Mich., 421), Judge Cooley decided such a note to be negotiable, and stated that the legal rights of the holder were clear and certain, the note being due at a time fixed and not before, the maker having a mere option to pay in advance of the legal liability if he saw fit.*

Where the note is written, payable "on return of this receipt or note," it is held negotiable, as this provision is not a contingency, but a mere restriction implied if not expressed in every promissory note, subject to an exception in case the instrument is lost by accident or mistake. (*Frank v. Wessels*, 64 N. Y., 158.) But "payable on the return of my guaranty of a certain note" added to a note was held to impose a condition not implied by law, and to make the note non-negotiable. (*Blood v. Northrup*, 1 Kan., 29).

The provision in notes payable in part payments

**Walker v. Woolen*, 54 Ind., 164; *Cidne v. Chidester*, 85 Ill., 523; *Palmer v. Hummer*, 10 Kans., 464; *Helmer v. Krolick*, 36 Mich., 373, hold that an instrument so written is negotiable. *Stults v. Silva*, 119 Mass., 139; *Chouteau v. Allen*, 70 Mo., 339, seem to hold the contrary.

or installments, to the effect that if any one of the installments is not paid as agreed, all installments, or the whole sum shall become due and payable, does not destroy the negotiability of the note, and such notes are quite common.* The provision that the interest shall be paid at stated intervals, and if not paid the entire sum shall become due, is also common, and does not affect the negotiability of the paper.

Notes made payable at a certain date or time, and not written "on or before" the time, are not due until the time has arrived, and the holder may refuse to receive payment sooner. Building associations are required by statute in some States to release notes before due upon stated terms. (Rev. Stat. Ohio, Sec. 3836-3).

Sec. 767. **MUST CONTAIN WORDS OF NEGOTIABILITY.**—Another essential or requisite of negotiable paper is the set of words which from the first introduction of these instruments have been used to distinguish them from non-assignable contracts.** These words, as commonly employed, are

*"Such a note must state the times or dates when the several installments are payable. (Tiedeman, Com. Paper, Sec. 25d; *Moffat v. Edwards*, Car. & M., 16.

**"When bills of exchange first came into use, . . . choses in action were in general non-assignable; and in order that the intention of the parties, to make commercial paper assignable and negotiable, may be indicated, it became the custom to make it in express terms payable to A or order, or bearer, or using like words conveying an authority to transfer it. So, also, when promissory notes were by the statute of Anne declared to be negotiable, like bills of exchange, the notes

"order," "bearer," "assigns," and the like, placed after the name of the payee to indicate the intention of the parties that the instrument shall be transferable. By long usage and custom these or a similar expression have become an essential of a negotiable paper, though the change in the law as respects the assignment of contracts, would seem to make it unnecessary to employ words to indicate that the contract can be assigned, as all choses in action are now assignable.

Now by statute in the various States, as well as by decisions the words of negotiability are essential if the paper is to be negotiable, though it is a good and valid contract without these words. (Story on Bills, Sec. 60; *Michigan Bank v. Eldred*, 9 Wall., 544.)

Sec. 768. SAME SUBJECT—WORDS OF NEGOTIABILITY, EXAMPLES OF.—At first it was the inclination of the courts to be strict in regard to words expressing negotiability, and an early case held that a paper payable to a person or bearer was

which would fall within the statute were described as containing these or other words of negotiability. It has in consequence become the universal opinion that in order that negotiable paper may be negotiable and the indorsers be held liable as guarantors by the holder of the paper, it must contain these or like words of negotiability. Without these words of negotiability, the assignee of the bill and note would acquire only a right of action against his immediate indorser, and according to the early common law he could not maintain an action on it against the maker or the drawer and acceptor." (Tiedeman, *om. Paper*, Sec. 21. See also, *Rex v. Box* 6 Taunt., 328; *Maule v. Crawford*, 14 Hun., 193; *Warren v. Scott*, 32 Ia., 22; *Rev. Stat. Ohio*, Sec. 3171.

not negotiable. (*Hodges v. Steward*, 1 Salk., 125.) But it is now well settled that such an instrument is negotiable, and that no special or exact form of words is required to indicate the negotiability of the paper. (*Tiedeman*, Com. Paper, Sec. 22.) The expression, payable "to the order of A. B." is considered of the same effect as "to A. B., or order." (*Smith v. McClure*, 5 East, 476; *Durgin v. Bartol*, 64 Me., 473.) But a note payable "to the bearer A." is held non-negotiable. (*Warren v. Scott*, 32 Ia., 22.) It is held that while the words "order" or "bearer" are convenient and expressive terms to indicate negotiability, they are not the only words that are sufficient to give the paper this transferable quality, and instruments payable to a person or holder, or assigns, and the like, have been held negotiable *

Sec. 769. CONCERNING THE CONSIDERATION FOR THE NOTE OR BILL.—Walker gives as the sixth essential of a negotiable instrument that it must import a consideration, so as to preclude the necessity of inquiry and proof. (*Am. Law*, Sec. 180.) This statement does not mean that the consideration must be stated in the paper, or that as between the original parties the question of consideration can never be raised. The words so

**Raymond v. Middleton*, 29 Pa. St., 530; *Wilson County v. Natl. Bank*, 103 U. S., 776; *Douglass v. Wilkeson*, 6 Wend., 637.

In construing the State statute in Illinois it is held that a note payable to a person or bearer is not negotiable. (*Garvin v. Wiswell*, 83 Ill., 218.)

commonly used in notes and bills, "for value received," are not essential to the negotiability of the instrument, a consideration for the making or transfer is presumed, but as between the immediate parties it may be shown that there was no consideration given, and this whether the words "for value received" are used or not. But holders of negotiable instruments who are not original parties, and who have taken paper in the usual course of business are protected against a failure of the consideration between prior parties. (*Riley v. Johnson*, 8 Ohio, 526; *Conklin v. Vail*, 31 Ill., 166; *Jordan v. Pate*, 19 O. St., 586.) And under certain circumstances to be discussed later the maker of a note or bill or bond is precluded from showing a want or failure of consideration.*

Sec. 770. CONCERNING THE PLACE OF PAYMENT.—The name of the town or place where commercial paper is executed is customarily written with the date as in the forms given: "Conneaut, Ohio," etc., but this does not make it the duty of the holder to go to the place mentioned to demand payment. The contract being construed according to the laws where made, this mention of the place of execution is evidence tending to show by what law the parties meant to be governed. It may also

*By the law merchant words importing consideration received were deemed essential to bills of exchange, but they are not necessary now in negotiable instruments in the United States, unless, as in Missouri, the State statute requires the words "value received" to be inserted in all promissory notes. (*Tiedeman Com. Paper*, Sec. 31; *Bailey v. Smock*, 61 Mo., 213.)

be stated in the body of the instrument that the payment shall be made at a given place, and it is held that the holder need not make demand at the named place to render the maker or acceptor liable for non-payment, unless it is made payable at the given place "only and not elsewhere." (Cox v. Natl. Bank, 100 U. S., 714; Hills v. Place, 48 N. Y., 520.) But if the place of payment is expressly stated in the instrument the holder must make demand at this place in order to hold indorsers and others secondarily liable on the instrument. (Bank of the U. S. v. Smith, 11 Wheat., 171.) And by statute in some States it is made a requisite to the negotiability of a note or bill that the place of payment be specified in the body of the instrument. In the absence of a statute to this effect the place of payment need not be stated in the paper. (Rominger v. Keyes, 73 Ind., 376; Oates v. Natl. Bank, 100 U. S., 239; Tiedeman, Com. Paper, Sec. 30.)

Where no place of payment is mentioned in the paper, it is payable at the place of business of the maker or acceptor or at his residence in case he has no place of business. But in case the note is made payable at a named place it is best to make the demand at the place stated, though it is not absolutely necessary to hold the maker or acceptor.

Sec. 771. THE EFFECT OF A SEAL.—An instrument under seal, though possessing all essential features of commercial paper, is not negotiable

in the absence of a statute authorizing it. The rule grows out of the fact that by the law merchant the custom was to execute commercial paper without seals, and also that the common law forbade the assignment of sealed instruments, hence the seal is held to indicate an intention that the instrument shall not be negotiated. The rule formerly applied to the paper of a corporation executed under the corporate seal, but the tendency at present is to hold such paper negotiable on the ground that the seal of a corporation does not of itself indicate an intent to execute a specialty. (Tiedeman, Com. Paper, Sec. 32; *Rand v. Dovey*, 83 Pa. St., 280.)

Sec. 772. WITNESSES, DELIVERY, ETC.—It has been seen in a previous section, that the signature of the maker need not be attested by a witness even when the signature is by mark. Such witness is only a help in proving the execution, and may be replaced by other competent evidence. Where there is such a witness he must be called to prove the execution of the paper unless he cannot be produced, when the execution may be shown by proof of the witness' signature. (Tiedeman, Sec. 33; *Greenleaf on Ev.*, Sec. 575.)

There must be a delivery of the instrument to the payee to make it binding on the maker or drawer. Until delivered it is of no effect and is considered a nullity. (*Roberts v. Bethel*, 12 C. B., 778.) By delivery is meant the actual or constructive transfer of the instrument to the payee. When an actual

transfer of the paper is made to the payee no question can arise as to its sufficiency, but where the paper is given to an agent to be delivered to the payee it may be recalled by the maker at any time before delivery. (*Devries v. Shumate*, 53 Md., 216.) Where the custodian of the instrument is instructed to hold it for the payee or to deliver to him or his indorsee, it is held a sufficient constructive delivery. (*Fisher v. Bradford*, 7 Greenl., 28.) The delivery may be made to the payee, or to any person for his benefit with his consent. It may be sent to the payee by post, and if done with his express or implied consent constitutes a good delivery though lost in the mail. While in transit to the payee a maker or indorser may exercise the right of stoppage *in transitu* under the rules applicable to the case of vendor and vendee.

A *bona fide* holder of an instrument is not protected in case there has been no delivery to the payee. (*Richards v. Darst*, 51 Ill., 141; *Freeman v. Ellison*, 37 Mich., 459.) The paper becomes operative only from the time of its delivery, and if a date is stated in the paper the delivery is presumed to be made on that date, and before the day of maturity. But parol evidence is admissible to show the true date of delivery, and this governs, unless the instrument is written to mature at a certain time after date, when it will be considered as operating from the day of the date. (*Tiedeman*, Com. Paper, Sec. 34b; *Powell v. Waters*, 8 Cow., 669; *Lovejoy v. Whipple*, 18 Vt., 379.)

By the common law there is no prohibition of the making of contracts or doing work on Sunday, or the first day of the week; but in most of the States there are statutes forbidding all labor on this day and invalidating all contracts made on it. The execution and indorsement of negotiable paper comes within these statutes, and no suits can be brought on paper so made or indorsed.* But the paper may be dated and formulated on Sunday, and will be valid if delivered on some other day. (*Drake v. Rodgers*, 32 Me., 524.) And paper made and delivered on Sunday may be subsequently re-delivered and so ratified as to make it valid or authorize the recovery of the consideration for which it was given. (*Sayre v. Wheeler*, 31 Ia., 112.)**

Negotiable paper may be delivered as an "escrow," by which is meant that it shall be held by some one subject to the performance of a certain condition, and then be delivered to the payee. In

*Tiedeman, Com. Paper, Sec. 34c; *Benson v. Drake*, 55 Me., 555; *State Capital Bank v. Thompson*, 42 N. H., 370; *Smith v. Case*, 2 Ore., 190.

**"The court will take judicial notice of the fact that the date of the paper is a Sunday, and all parties to the contract are charged with notice of that fact. Where, however, the paper is delivered on Sunday, but bears a different date, the paper is only void as to those parties who take it with knowledge of the illegality. An indorsee for value, and without notice of its delivery on Sunday, will take a negotiable paper free from the defense of illegality." (Tiedeman, Com. Paper, Sec. 34c; *Pope v. Linn*, 50 Me., 84; *Cranson v. Goss*, 107 Mass., 439; *Ball v. Powers*, 62 Ga., 757. Contra, *Parker v. Pitts*, 73 Ind., 598.)

In Ohio, commercial paper is valid though executed on Sunday. (*Bloom v. Richards*, 2 Ohio St., 387.)

the case of a deed delivered as an escrow it must be held by a stranger, and not by the grantee if it is to operate as an escrow. And except in New York this rule is held to apply to commercial paper. In the case of *Benton v. Martin* (52 N. Y., 574), it was stated that negotiable paper might be delivered to the payee subject to a condition, "the observance of which is essential to their validity." And in other cases it is held that a second delivery to the payee or indorsee is not necessary when commercial paper is deposited as an escrow. (*Taylor v. Thomas*, 13 Kans., 217; 1 Daniel's *Negot. Inst.*, Sec. 68.)

Sec. 773. THE EFFECT OF NOTES AND BILLS EXECUTED IN BLANK.—It is not unusual for a person wishing to secure a loan on his note or bill to obtain the signature of persons as accommodation makers to sign the bill or note in blank, or to affix their signature to a blank paper with authority to fill up the blank as a bill or note in a certain amount. Such instruments are held to be binding upon the parties who have signed them, and to constitute a general letter of credit to any person who takes it without knowledge of limitations or conditions imposed, and pays value for it. In the absence of knowledge of the limitation of his authority the party to whom such a paper is entrusted is presumed to have implied authority to fill up the blanks and perfect the instrument, and the parties who have so signed are bound

though the paper is executed for a greater amount than was intended.*

Sec. 774. WORDS SUFFICIENT TO CONSTITUTE THE PROMISE.—It is not necessary that the words expressing the obligation to pay be confined to any particular form or expression. Thus a promise to “deliver,” to be “accountable,” to be “responsible,” and the like, have been held sufficient promises to pay the amount stated in the note. And where the expression used was “Borrowed of A. B. fifty dollars, which I agree never to pay him, or order,” it was held that the word “never” should be rejected as surplusage, and the amount be deemed payable on demand. And the expressions, “I have agreed to pay,” “I acknowledge to owe,” “I am content to pay,” and the like, have been held sufficient in a bond.**

In a bill of exchange the words used must create a distinct and certain obligation to pay the amount mentioned, but the expression “please pay” used in a bill directed to the drawee is considered a mere civility and does not destroy the effect of the order or command to the drawee. But a supplicatory request to another, the granting of which is a favor

*Pittsburg v. Neal, 22 How., 107; Bank v. Smith, et al., 5 Ohio, 222; Schryver v. Hanks, 22 Ohio St., 308; White v. Vermont, etc., R. R. Co., 21 How., 575. But by the weight of authority an agent cannot by parol authority thus fill up blanks in a bond or deed under seal and must have authority under seal to do so, or the delivery must be made by the maker himself. (Tiedeman, Com. Paper, Sec. 35.)

**Swan's Treatise, 15th ed., p. 696.

and not a right, does not constitute a bill of exchange, unless the words of command are indicated by the use of words of negotiability.*

The expression "pay" in a note or bill, may be replaced by the equivalent expression "deliver," "credit in cash," and the like. (*Morris v. Lee*, 2 *Ld. Raym.*, 1396.) In a note the certain promise to pay may be indicated by any series of words that constitute a promise, and in a number of States a due bill, or acknowledgment of an existing indebtedness is held to be a promissory note, and especially when followed by words of negotiability.**

**Tiedeman*, Com. Paper, Sec. 23; *Little v. Slackford*, 1 *M. & M.*, 371; *Ruff v. Webb*, 1 *Esp. R.*, 129.

***Brady v. Chandler* 31 *Mo.*, 28; *Carver v. Hayes*, 47 *Me.*, 257; *Smith v. Allen*, 5 *Day*, 337. But the contrary doctrine in regard to due bills, or "I. O. U.s" is held in England and some of the States, they being considered insufficient as promissory notes. (*Fesenmayer v. Adcock*, 16 *M. & W.*, 449; *Currier v. Lockwood*, 40 *Conn.*, 348.)

CHAPTER III.

THE PARTIES.

Sec. 775. IN GENERAL.—Negotiable contracts, in general, are governed by the same rules which apply to all contracts as regards the capacity of the parties to enter into the contract or assume the obligation. Hence we shall merely observe at this time that infants, insane persons, married women, under the rules of the common law, and alien enemies are, as a rule, incapable of making, accepting, or indorsing a bill or note; and paper executed by such persons is either void or voidable. But, on the other hand, it is not only competent individuals who may become parties to commercial paper. Negotiable instruments may be executed and transferred by a firm or partnership, by public and private corporations, and by one person acting for another as an agent.*

Sec. 776. COMMERCIAL PAPER OF AN INFANT CONSIDERED.—An infant's contracts are now generally regarded as voidable rather than void, and except in the case of necessities, the infant may disaffirm any contract into which he has entered.** While this is true of most of the contracts entered into by an infant, it is quite generally

*See No. 4, *Cyclopedia of Law*, Secs. 452-458.

**See No. 3, *Cyclopedia of Law*, Sec. 378.

held in the case of negotiable paper made, accepted or indorsed by an infant, that the instrument is not only voidable but absolutely void. (Conn v. Coburn, 7 N. H., 368; Morton v. Steward, 5 Ill. App., 533.) Other authorities maintain that while the note or bill made by an infant is not negotiable so as to preclude inquiries when in the hands of a *bona fide* holder, the holder of such paper is subrogated to the rights of the original payee, and may recover in the name of the payee the original consideration for the paper. (Tiedeman, Com. Paper, Sec. 48.) When the instrument has been given for necessities for the infant, the holder is entitled to recover the value of the articles supplied.

A note or bill made payable to an infant is valid, and may be enforced by the infant against the maker or acceptor, since the privilege of avoiding the contract lies with, and is for the benefit of the infant. But payment to the infant payee will not protect the payor unless made through the infant's guardian. (Phillips v. Paget, 2 Ark., 80.) If the infant payee indorse the note or bill, the maker or acceptor is bound to pay the indorsee, as the drawing of the paper payable to an infant estops them from denying his capacity to indorse the paper. The infant, however, not being bound by his indorsement may choose to disaffirm it, and by returning the consideration received, compel the maker or acceptor to pay him, although the money has already been paid to the indorsee; or the infant may disaffirm the indorsement, notify all the

parties, and if payment has not been made to the indorsee, destroy his title to the paper.*

The infant on coming of age, may ratify commercial paper executed or indorsed by him during his infancy, and such paper then becomes valid and binding, and may be enforced by any holder. No consideration is required for such ratification, but there should be a new promise to pay. This promise need not be formal or in writing, it may be made orally and in any form of words. (*Owis v. Kimball*, 3 N. H., 314; *Martin v. Mayo*, 10 Mass., 137.)

Sec. 777. COMMERCIAL PAPER OF INSANE PERSONS CONSIDERED.—Any person mentally deficient, as a lunatic, imbecile, drunken person, and the like, cannot make a contract binding upon them during the period of such incompetency. One ignorant of the insanity of a person with whom he contracts and who has acted in good faith and taken no advantage will be protected, and for necessities a lunatic may bind himself upon a bill or note. (*Moore v. Hershey*, 90 Pa. St., 196; *Williams v. Wentworth*, 5 Beav., 325.) Such persons, however, may be payees of bills or notes and may compel payment to them or a return of the consideration. As payees they may indorse the paper and the indorsee may recover of the maker or acceptor, who is estopped from denying capacity to

**Melburg v. Watrous*, 7 Hill, 110; *Bool v. Mix*, 17 Wend., 119; *Taylor v. Croker*, 4 Esp., 187; *Hardy v. Waters*, 38 Me., 450.

indorse if the payee was incompetent when the paper was executed. (Tiedeman, Com. Paper, Sec. 56.) But, as a rule, these contracts are considered voidable rather than void, and may be ratified or disaffirmed by the party when he recovers, or by his guardian or representatives.*

Sec. 778. COMMERCIAL PAPER OF MARRIED WOMEN CONSIDERED.--"According to the common law, a married woman cannot make or accept or indorse a commercial instrument, and her attempted execution, acceptance or indorsement of such an instrument is absolutely void."** But modern statutes in the various States have modified the common law in regard to the contracts of married women, and under these statutes married women may execute valid commercial paper ***

All negotiable instruments of the wife are held to be choses in action, and at the common law a mar-

*Campbell v. Kuhn, 45 Mich., 513; Halley v. Froester, 72 Mo., 73; Calkins v. Fry, 35 Conn., 170.

**Tiedeman, Com. Paper, Sec. 59. But at the common law if the husband of the married woman was an alien enemy, or was otherwise unable to aid the wife, as in case he was imprisoned, banished or had entered a monastery, then the wife might make valid commercial paper. As a sole trader she could also make any contract necessary to such separate business. (Abbott v. Bailey, 6 Pick., 89; Hatchet v. Baddeley, 2 W. Bl., 1079; 2 Kent Com., 136.)

***See No. 3 Home Law School Series, Secs. 327-328; Camden v. Mullen, 29 Cal., 566. So in regard to property granted to a married woman to her sole and separate use, known as her equitable estate, she may make valid commercial paper. (Todd v. Lee., 15 Wis., 365; Williams v. Urmston, 35 Ohio St., 296.)

ried woman could not pass title to such instruments by delivery or indorsement, though she was the named payee, unless the husband also consented. (*Barlow v. Bishop*, 1 East, 432.) The husband could indorse the paper and pass title, or could sue upon it by joining with the wife. (*Mason v. Morgan*, 2 Ad. & El., 30; *Richards v. Richards*, 2 B. & Ad., 447.) Also by the common law, the husband was required to reduce the wife's choses in action to possession, and unless he did so, at his death they became the absolute property of the widow and not of the husband's personal representatives. (*Gaters v. Madely*, 6 M. & W., 423; *Draper v. Jackson*, 16 Mass., 480.) Now the property rights of married women are regulated by statute in the various States, and the rules of the common law are greatly modified if not entirely abrogated. Under the modern statutes of distribution the husband who has not reduced the wife's choses in action to possession during her life, takes only his distributive share after her death. (*Tiedeman, Com. Paper*, Sec 64.)

Sec. 779. AN ALIEN ENEMY CANNOT BE A PARTY TO COMMERCIAL PAPER.—Every bill or note attempted to be negotiated between parties whose respective countries are at war with each other, is void, and cannot be enforced during or after the close of hostilities. (*Ward v. Smith*, 7 Wall., 447.) The two hostile countries are deemed sealed to each other so as to prevent all commercial intercourse. (1 *Daniel's Negot. Inst.*, Sec 220.)

Sec. 780. PARTNERS AS PARTIES TO COMMERCIAL PAPER.—The subject of Partnership has been treated in a previous number of the Home Law School Series, to which the student is referred at this time.* The rights and liabilities of the partners to validly executed firm paper was fully discussed in the previous volume, and it is only necessary at this time to again point out the fact that the partners only have implied power to make and negotiate commercial paper in case the firm is a trading partnership, or one whose business necessitates the use of commercial paper. If it comes within the nature and scope of the firm's business to issue negotiable paper, any partner may bind the firm by making or accepting a note or bill, though the proceeds are for his own benefit if the holder of the paper was not a party to the fraud.**

Where the business of the firm is not of the character to imply such authority, that is, where the firm is regarded as a non-trading firm, commercial paper issued in the name of the firm by one partner will not bind the other partner. (*Dickenson v. Valpy*, 10 B. & C., 128.)

A partner cannot, however, under his implied

*No. 4, Home Law School Series.

**Illustration: Where X, a partner in a trading firm, makes a note in the firm name, payable to C for his accommodation, or as surety for him, without the knowledge of the other partners, the firm is not liable to C, but is liable to a *bona fide* holder of the note for value. (*Heffron v. Hanaford*, 40 Mich., 305; *Austin v. Vandermark*, 4 Hill., 259; *Chemung Bank v. Bradner*, 44 N. Y., 680.)

powers, issue purely accommodation paper, or paper for his own private benefit, and for a purpose unconnected with the business of the firm. If such paper is issued, it will not bind the other partners until it has passed into the hands of a *bona fide* holder, who has given value for it without notice of the fraud upon the other partners. (Atlantic St. Bank v. Savery, 82 N. Y., 294; Burke v. Wilbur, 42 Mich., 329.) This is the result of the rule of negotiability which applies when the indorsee shows that the paper bearing the firm name was taken by him without knowledge of its improper issue and for value. (Monroe v. Copper, 5 Pick., 412.)

The proper form of signing the firm name to any contract made by a partner is to write the firm name and nothing else. It is permissible but unnecessary to write the name of the partner after the firm signature. It is held to be a good firm signature to write all the names of the partners without using the partnership name. (Maynard v. Fellows, 43 N. H., 255.) If there is a material variance in the firm name as used by the partner in signing the note or bill the firm will not be bound as where the firm name is that of an individual and the note is signed in the name of the individual with the addition of "& Co." (Kirk v. Blurton, 9 M. & W., 284.) And it must appear upon the face of the paper that it is a firm obligation if the firm is to be bound. (Gallway v. Mathew, 10 East, 264.)

In case a bill is payable to the order of the firm and the partnership is subsequently dissolved the

indorsement of an ex-partner in the firm name transfers the property therein and authorizes the payment thereof (Benjamin's Chalmers, Article 80.)

Sec. 781. CORPORATIONS AS PARTIES TO COMMERCIAL PAPER.—Corporations are either private or public. The distinction being, that in the former a few individuals own and control the franchises and property of the corporation, while in the latter the interests and franchises belong to the general public, or people composing the district which the corporation covers. The former is managed for private gain, the latter for public service and advantage. It is said that private corporations are organized to prosecute private interest or business as distinguished from governmental or public undertakings.

A corporation derives its authority from its charter; it can incur no liability by drawing, indorsing, or accepting a bill, unless expressly or impliedly empowered by its act of incorporation so to do, and in general the capacity of a corporation to bind itself by a bill, is co-extensive with its capacity to contract. (Benj.'s Chalm., Art. 67; *Curtis v. Smith*, 15 N. Y., 66.) Thus a corporation chartered to build a railroad, may bind itself by note for materials used in constructing the road, but could not accept accommodation paper to aid another company in constructing its road. (*Smead v. R. R. Co.*, 11 Ind., 104.) A bill given to the order of the corporation transfers the property therein,

though from want of capacity the corporation may not be liable thereon as an indorser. (*Brown v. Donnell*, 49 Me., 421.)

Sec. 782. SAME SUBJECT — BONA FIDE HOLDERS.—As against original parties to commercial paper of a corporation which has been issued *ultra vires*, that is, without authority, the corporation may plead its lack of authority, but in the hands of *bona fide* indorsees for value, the common rule of negotiable paper prevents the corporation from setting up this defence. (*Tiedeman*, Com. Pap., Sec. 116.) In the case of accommodation paper this rule does not apply, and the paper is considered void. And where the corporation has expressly declared that paper issued *ultra vires* shall be void, a *bona fide* holder gets no title.

It is the rule of law that commercial paper should not be issued under seal. At common law a corporation could not make a binding contract without using its corporate seal. It was formerly held that the seal destroyed the negotiability of the instrument but the rule is now relaxed, and the commercial paper of a corporation under seal is negotiable, and further, that in making commercial paper a corporation may dispense with the use of its corporate seal. (*Barrett v. Schuyler*, Co. Court, 44 Mo., 197; *Clark v. Iowa City*, 20 Wall., 583; *Beaver Co. v. Armstrong*, 44 Pa. St., 63.)

A corporation has the implied power to take a note or bill for any debt due it. (*Buckley v.*

Briggs, 30 Mo., 452.) But in order to make a regular business of lending money and taking paper of the borrower the power must be given in its charter. (Grand Lodge of Free Masons v. Waddill, 36 Ala., 313.)

Sec. 783. SAME SUBJECT—A CORPORATION ACTS BY ITS AGENTS, THEIR POWERS.—The power to appoint agents is necessarily implied as the corporation can only act through its agents and officers. The power is general and unlimited unless expressly denied. But an agent appointed by a corporation must have express authority to issue notes, unless his position is such as by general custom and usage would authorize him to bind the corporation. (Odd Fellows v. First Natl. Bank, 42 Mich., 463.)

A cashier of a bank has implied power to bind his bank by putting his official signature to commercial paper. He may transfer the negotiable paper of the bank; give the bank's note for borrowed money; accept bills and certify checks drawn on the bank; sell notes and bills of the bank; and draw bills and checks on the bank's deposits.*

The president of a corporation also, as its chief executive officer, has implied power to represent the corporation in various ways. He may bring suits in the name of the corporation (Alexandria Canal Co. v. Swann, 5 How., 83), and in case of a banking corporation he may receipt for deposits and do

*Tiedeman, Com. Paper, Sec. 120; Morse on Banking, 164.

other acts in the ordinary course of business by following the customary rules of the institution. (*Sterling v. Marietta Co.*, 11 Serg. & R., 170; *Foster v. Essex Bank*, 17 Mass., 479.) Neither the cashier nor president of a bank has implied authority to release any claim due the bank; this power must be exercised by the board of directors. (*Bank of U. S. v. Dunn*, 6 Pet., 51; *Olney v. Chadsey*, 7 R. I., 225.)

Other officers of corporations, as secretary, treasurer, etc., may be expressly authorized to issue commercial paper for the corporation or they may have such power from implication by reason of having exercised it previously. (*Tiedeman*, Com. Pap., Sec. 122.) The proper signature of a corporation by an agent is the name of the corporation followed by the name of the agent making the signature with his official designation. But this is not the only form of a corporate signature which will bind the corporation. Where the name of the corporation appears in the instrument as the party to be bound, and is signed by an authorized agent of the corporation with his name and official title, it is held a good corporate obligation.*

So, later decisions hold, that where it appears from the signature of the agent that he is acting in a representative capacity for the corporation, as where he uses the words "on account of," "for the use of," and the like, in connection with the name

**Commercial Bank v. Newport Mfg. Co.*, 1 B. Monr., 13; *Township v. Citizen's Bank*, 81 Ind., 515; *Tiedeman*, Com. Paper, Sec. 123.

of the corporation, it will be considered a corporate obligation. (Lindud v. Melrose, 3 H. & N., 177; Dow v. Moore, 47 N. H., 419.)

As the drawee named in the bill is the only one who can accept it, except for honor *supra protest*, unless the bill is drawn upon a corporation it cannot be accepted even by an authorized agent for the corporation. The principles already stated govern in determining whether the bill is drawn on a corporation or an individual. (Walker v. Bank, 9 N. Y., 582.) In making acceptances or indorsements the designation of the drawee and payee indicate the correct form of signature. If the bill is payable to an individual in his personal capacity, he cannot make the corporation an indorser by affixing its name, if liable at all on such a signature it would be as a guarantor. But if the bill or note is properly payable to the corporation, an indorsement by an authorized officer using his own signature and official designation will bind the corporation. (Tiedeman Com. Pap., Sec. 126.)

Sec. 784. PUBLIC OR MUNICIPAL CORPORATIONS AS PARTIES TO COMMERCIAL PAPER.—The State or Federal governments as corporations may, by their duly authorized agents, become parties to the different species of commercial paper, either as drawer, maker or acceptor. (United States v. Bank, 15 Pet., 377; State ex rel. Plock v. Cobb, 64 Ala., 156.) But as the ordinary exercise of their powers does not require the use of

this power, the courts do not recognize any officer or agent of the government as possessing implied power to bind the government by making or accepting commercial paper. The authority to make or accept commercial paper in order to bind the government must be expressly granted to the officer by the legislative department of the government or necessary to carry out some express power.*

A slight distinction is sought to be drawn between public corporations and municipal corporations, the latter having reference more particularly to incorporated villages, towns and cities. (Dillon Mun. Corp., Sec. 10.) But the distinction is of little importance as the legislature in each case fixes the powers of these corporations by special acts or general laws.

It is conceded by the weight of authority that municipal corporations may exercise the power to borrow money as an implied power, though not expressly granted, if necessary to carry out the purposes for which they were created. (Williamsport v. Commonwealth, 84 Pa. St., 487; City of Galena

*Floyd Acceptances, 7 Wall., 667. In this case it was held that no officer of the United States government has the implied authority to bind the government by his acceptance of a bill in his official capacity, although it can be shown by extraneous evidence, as well as on the face of the bill, that the bill was accepted in order to provide supplies for an acknowledged public purpose. (Tiedeman, Com. Paper., Sec. 132.) Miller, J., said in summing up the case: "We are of the opinion that, as there can be no lawful occasion for any department of the government, or for any of its officers or agents to accept drafts drawn on them, under any statute or other law now known to us, such acceptances cannot bind the government."

v. Corwith, 48 Ill., 423.) But it seems that the weight of authority would deny them the right to issue negotiable paper to secure such borrowed money unless they had been expressly authorized to borrow. It being claimed that it is not necessary to the exercise of the power that negotiable securities be issued. (Reinboth v. Pittsburg, 41 Pa. St., 278; Railroad Co. v. Evansville, 15 Ind., 395; Mayor v. Ray, 19 Wall., 476.) Other cases hold that for lawful debts a municipal corporation not restricted by its charter or prohibited by statute, may issue notes, bills, or bonds, and that these in the hands of *bona fide* holders will be free from equitable and other defences not appearing on the face of such instruments or to be gathered from the ordinances or published notices in reference to such securities.*

Sec. 785. SAME SUBJECT—HOW THE CORPORATION IS BOUND, SIGNATURE OF AGENT.—As the common council is the legislature for a municipal corporation, it must authorize the execution and issue of municipal obligations. No administrative or executive officer of the municipality has implied power to issue negotiable securities, and must be expressly authorized so to do. (Little Rock v. State Bank, 3 Eng. (Ark.), 227.)

Officers of the government and other public cor-

*Tiedeman, Com. Paper., Sec. 134 and note. Bank of Chillicothe v. Chillicothe, 7 Ohio, 31; Mullarkey v. Cedar Falls 19 Ia., 21; Clark v. DesMoines, 19 Ia., 199.

porations are not held to the same rule of agency by which in exceeding their authority they bind themselves; every one having dealings with a public officer is supposed to know the legal limitations of his agency, so that when a public officer in innocent mistake of the law makes an unauthorized contract in the name of the public corporation neither he nor the corporation is bound. (*Houston v. Clay County*, 18 Ind., 396; *Ogden v. Raymond*, 22 Conn., 379.)

The officer of a municipal corporation acting in his official capacity must take care that the fact of his official character appear on the face of the instrument and that he is not acting in his personal character or he will bind himself. But in this case not the same degree of technicality is required as in the case of private corporations, and in some cases it is held that merely adding his official designation to his signature will relieve him of personal liability. (*Dugan v. United States*, 3 Wheat., 172; *McGee v. Laramore*, 50 Mo., 425.)

Drafts or warrants drawn by one officer of a municipal corporation on another, and used chiefly for the purposes of furnishing vouchers to the officer in charge of the funds, are quite generally held not to be negotiable, but some cases conclude that if drawn in negotiable form by the proper officer they will be valid negotiable instruments. (*Kelly v. Mayor of Brooklyn*, 4 Hill, 265.) When these drafts or warrants are recognized as negotiable they may be transferred by indorsement as other com-

mercial paper. If they are treated as not negotiable then the party transferring them does not become liable as an indorser. (Keller v. Hicks, 22 Cal., 460; Bull v. Sims, 23 N. Y., 571.) The warrants are assignable and the assignee may recover of the corporation subject to the equities existing against the assignor. (Tiedeman, Com. Pap., Sec. 139.)

Sec. 786. TRUSTEES, GUARDIANS, ETC., AS PARTIES TO COMMERCIAL PAPER.—In general trustees and guardians cannot issue any bill or note which will bind the estate they represent, though issued in their representative capacity. By attempting to do so they bind themselves personally. (Robertson v. Banks, 1 Smedes & M., 666; Conner v. Clark, 13 Cal., 168.)

A note or bill made payable to a guardian or trustee cannot be endorsed away by the guardian for his own private debts, the indorsee taking the paper in every such case charged with the trust. (Baughn v. Schackelford, 48 Miss., 255.) Other cases hold that in the hands of a *bona fide* holder without notice other than that of the character of the paper, the paper will be free from the trust. (Thorton v. Rankin, 19 Mo., 193.)

The executor or administrator of an estate cannot issue commercial paper in his representative capacity to bind the estate. (Curtis v. Bank, 39 Ohio St., 579; Lynch v. Kirby, 65 Ga., 279.) Neither can he accept a bill drawn on a claim against the estate, and if he does so he will bind himself personally

(Wisdom v. Becker, 52 Ill., 342), in whatever way the signature is written. A note by an administrator in settlement of a debt of the estate will not discharge the obligation unless accepted as absolute payment of the original debt. (Yerger v. Foote, 48 Miss., 62.) He may limit his personal liability by making the note payable out of the assets of the estate, but this destroys the negotiability of the instrument because payable out of a particular fund.*

There must be some new consideration for the promise of the executor or administrator if he is to be bound personally, but a consideration is presumed from the fact that he has assets of the estate in his hands when he made the paper. This presumption may be rebutted, and then in case no other consideration appears the personal representative will be liable only to the amount of the assets in his hands belonging to the estate. (Walker v. Patterson, 36 Me., 273; Rittenhouse v. Ammerman, 64 Mo., 197.) The executor's note in the hands of *bona fide* holders without notice will be enforceable regardless of the consideration. (Bank of Troy v. Topping, 13 Wend., 273.)

A bill or note which was payable to the decedent in his life time should be treated by the representative as other personal property, and suit should be brought in his representative capacity. When the note is payable to the executor or administrator as such, he may sue on it in his own name or in his representative capacity. The personal represent-

*See Ante, Sec. 760.

ative may transfer or indorse the paper of the estate, but in the case of indorsements unless he exempts himself he will become personally liable as an indorser. A note payable to the decedent may be indorsed by any one of his representatives, while if made payable to his representatives, all must join in the indorsement. The indorsement does not pass title unless there is a delivery of the paper. (Tiedeman, Com. Pap., Sec. 148.)

CHAPTER IV.

THE CONSIDERATION.

Sec. 787. IN GENERAL.—It is a general rule of law that all executory contracts to be enforceable must rest upon a valuable consideration. And this rule applies to negotiable instruments as regards the immediate or original parties to the instrument.* By the common law, and now quite generally, it is presumed that every negotiable instrument was given upon a valuable consideration, and words acknowledging receipt of consideration are not essential to the validity of the paper.**

Sec. 788. WHAT CONSTITUTES A VALUABLE CONSIDERATION.—In general a valuable consideration as applied to the law of commercial paper is any consideration sufficient to support a simple contract. Thus a cross acceptance, the forbearance of a debt of a third person, the compromise of a disputed liability, or a debt barred by the statute of limitations, is held to constitute a valuable

*See Sections 437 et seq., No. 4 of the Home Law School Series.

***Popplewell v. Wilson*, 1 Stra., 264; *Mandeville v. Welch*, 5 Wheat., 277; *Dean v. Carruth*, 108 Mass., 242. By statute in some of the states, as Arkansas (Rev. Stat. Ark., 1874, Sec. 568), Missouri (*Macy v. Kendall*, 33 Mo., 164), and Pennsylvania (*Purdon's Digest*, 1894, p. 1731, Sec. 1). It is required that all promissory notes contain the words "for value received" in order to be negotiable.

consideration. (Benj. Chalmers, *B. N. & Checks*, Art. 82.) So an antecedent or pre-existing debt will be a valuable consideration in support of a bill or note, when the bill is received in absolute payment of the original debt, if nothing but a conditional payment the holder's rights will be determined by a subsequent rule governing bills taken as collateral security. (*Bank v. Gilliland*, 23 Wend., 311; *Bardsley v. Delp*, 88 Pa. St., 420.)

A valuable consideration is defined by Lush, J., in *Currie v. Misa*, 10 L. R., Ex., 162, as "some right, interest or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." Its adequacy will not be investigated if given in good faith, but where the consideration is not in good faith or there is fraud or mistake, or the consideration is illegal, or the parties are so situated that an unfair advantage is taken by one of them, as where one drives a hard bargain with an expectant heir or reversioner, the consideration may be questioned in actions between the parties. (Tiedeman, *Com. Pap.*, Sec. 154; *Nevill v. Snelling*, 15 Ch. D., 679; *Thomas v. Thomas*, 7 Wis., 476.) A mere moral obligation, the giving up of a void note, or a voluntary gift of money will not constitute a valuable consideration. (*Eastwood v. Kenyon*, 11 A. & E., 438; *Hill v. Wilson*, 8 L. R. Ch., 894.)

Sec. 789. WHO ARE HOLDERS FOR VALUE?—If value has at any time been given for a

bill, the holder of it is a holder for value as regards the acceptor and all parties prior to such time; thus, B owes C \$50. In order to pay C, A draws at B's request a bill on B for \$50 in favor of C. C is a holder for value and can sue A, though A has received no value. (Benj.'s Chalmers, B. N. & Checks, Art. 83.) So it will not matter to the holder that value was given to a person who never signed the instrument, or whose signature has been struck out. Thus a note may be made to an individual for a debt due to a company of which the individual is an agent (*Lomas v. Bradshaw*, 19 L. J. C. P., 273); or to a public officer for a debt due the State (*Hunter v. Field*, 20 Ohio, 340). So where the note has been indorsed in blank without value, and the indorsee indorses to another for value, the holder may sue all the parties. (*Brummel v. Enders*, 18 Gratt., 905.) A person must receive a bill in payment of a debt due him if he is to be considered a holder for value of a bill of his debtor's. The holder of a bill who receives it from a holder for value, but does not himself give value for it, has all the rights of a holder for value against all parties to the bill except the person from whom he receives it. (*Frederick v. Winans*, 51 Wis., 472; *Rickle v. Dow*, 39 Mich., 91.) But a holder for value may or may not be a holder for value without notice and in good faith, and if it can be shown that he is not a holder in good faith and without notice, this will sometimes defeat his action. (*Ethridge v. Gallagher*, 55 Miss., 464.)

A holder having a lien on a bill, as a banker or broker, arising either by agreement or by implication of law, is held to be a holder for value to the extent of the sum for which he has a lien. And the holder of a bill taken as collateral security is a holder for value where the debt was created at the time of the transfer, or where taken for a pre-existing debt and there is an express or implied agreement to extend the time of payment of such debt, or other like consideration. (Logan v. Smith, 62 Mo., 455; Moore v. Ryder, 65 N. Y., 438; Stotts v. Byers, 17 Ia., 303.)

The courts are divided where a note is taken for a pre-existing debt and no other consideration appears, some holding that the party is a holder for value because of his responsibility as a party to the instrument. (Swift v. Tyson, 16 Pet. i; Comstock v. Hier, 73 N. Y., 269.) Others deny this, but regard him as a holder for value as against the claim that the paper was given for accommodation. (Cummings v. Boyd, 83 Pa. St., 376.) A bill will be presumed to have been negotiated for value and not to have been pledged or given as collateral security, but this presumption may be disproved. (Trustees v. Hill, 12 Ia., 462.)*

*Mr. Daniels, in his "Negotiable Instruments," Sec. 831c, classifies the New York decisions on the question when a holder is one for value having taken the paper as collateral or for a pre-existing debt, as follows: "The transferee has been declared to be entitled to protection as a *bona fide* holder for value in the following instances: (1) Where the collateral note was taken for a loan contracted on the faith of its transfer; (2) where the transferee of the note surrendered a security

Sec 790. WHO ARE BONA FIDE HOLDERS FOR VALUE WITHOUT NOTICE?—A *bona fide* holder for value without notice is a holder who, at the time he becomes the holder and gives value, is really and truly without notice of any facts which, if known, would defeat his title to the bill. Thus where a bill is payable in two installments and the holder pays one installment without notice of any fraud, but before the second payment he learns that the bill was obtained by fraud, if he pays the second installment he cannot collect for it, but only for the first installment. (Benj.'s Chalmers, B. N. & Checks, Art. 85; Dresser v. Missouri Co., 93 U. S., 92.) The terms "*bona fide* holder," "innocent indorsee," etc., are used synonymously with the expression "*bona fide* holder for value without notice." Under the English code, Sec. 29, the phrase "holder in due course" is used in the same sense.

By "notice" is meant either actual notice, or a knowledge of such facts of wrong-doing as would, if disregarded, constitute bad faith. Mere negligence

for the antecedent debt; (3) where he received the note in payment of a previous note which was surrendered and canceled; (4) where he received the note as absolute payment of a pre-existing debt and not merely as security; (5) where he received the note with a valid agreement for an extension of time, or with an agreement not to sue upon a pre-existing debt; (6) where he received the note, paying part cash, and applying the residue in payment of a pre-existing debt; (7) where he received the note in part payment of the pre-existing debt, surrendering old notes and taking new notes for the balance; (8) where he received the note and discontinued proceedings upon an execution."

or even gross negligence, will not in the absence of bad faith constitute notice to one who has taken a bill for value without notice. (Goodman v. Simonds, 20 How., 343.) Gross negligence may be evidence of bad faith, but is not conclusive of it, and bad faith is now considered necessary to defeat a *bona fide* holder for value. (Goodman v. Harvey, 4 A. & E. at 876; Johnson v. Way, 27 C. St., 374.)*

When a bill is overdue, or has an irregularity appearing on its face the holder of it will be charged with notice. These are considered equivalent to notice of all defects relating to it. (McSherry v. Brooks, 46 Md., 118.)

A holder who takes a bill or note from a *bona fide* holder for value without notice is subjected to all the rights of such former holder, though he himself gave no value and may have had notice, if he was not a party to the fraud. (Woodworth v. Huntoon, 40 Ill., 131.) But the paper will not be freed from the fraud of a party by being negotiated to an innocent party when it has come back to the hands of the wrong-doer. (Calhoun v. Albin, 48 Mo., 304.)

A defense available against an immediate party, as fraud, lack of consideration, etc., is available against a remote party who is in privity with such immediate party. Immediate parties are those in

*"Illustration: D, the holder of a bill indorsed in blank, transfers it to E for value. E suspects that D had obtained the bill by a false representation, and consequently makes no inquiries. As a fact D stole the bill. E is not a *bona fide* holder; he is affected with notice." (Benj.'s Chalmers, B. N. and Checks, Art. 86; Parsons v. Jones, 99 U. S., 434.)

Direct relation with each other, as the drawer and acceptor, indorser and indorsee; all other parties are remote. Privity between the parties is created in all cases by want of consideration, sometimes by notice, and by agreement. Thus notice creates privity when it is notice of the defective title of him from whom the bill is taken. A holder of a bill who has given no consideration is deemed, as regards third parties, as the agent of the party from whom he took the bill, and he holds it subject to all the defenses against the person for whom he is regarded as an agent. (Benj.'s Chalmers, B. N. & Checks, Art. 88.)

Sec. 791. SAME SUBJECT — ACCOMMODATION PAPER.—An accommodation paper or bill indicates that the principal debtor, maker or acceptor, is lending his name for the benefit of some other person who may or may not be a party to the instrument. Thus A draws a bill on B. B accepts it to accommodate A, and it is then negotiated. This is an accommodation paper, and B is an accommodation party, or one who has signed without receiving value, and for the purpose of securing credit for the other party. It will be seen that as between the accommodating party and the party accommodated, there being no consideration no action could be maintained, and the paper is of no significance until negotiated. But the holder who has taken the accommodation paper for value can enforce it against all the parties to it. But if

the holder had notice of the character of the paper the accommodation party may set up any defense which would avail the party accommodated, as to set off a debt due from the holder to the party accommodated. Until an accommodation bill has been negotiated the accommodation party may rescind his obligation and demand the recall of the instrument or the cancellation of his signature (Tiedeman, Com. Pap., Sec. 158.) The consideration given by a holder for value of accommodation paper makes the paper enforceable against all parties to it, and this is true where the paper has been negotiated after due. (Seyfert v. Edison, 16 Vroom, 393.)

Sec. 792. EFFECT WHEN CONSIDERATION IS NOT GIVEN, OR FAILS, ETC.—It has been seen in the previous section, that the mere absence of consideration, as in accommodation paper, is only a defense as against an immediate party or a remote party who is not a holder for value, and is not a defense against a remote holder for value. Thus where a note is given to the holder as a gift, the holder cannot sue the giver. But if such a note were indorsed away for value, the indorsee could sue the maker.*

*“A draws a bill on B for \$100. B accepts it to accommodate A. A discounts it with C, who knows that it is an accommodation bill. C can sue A or B for \$100: but if C, instead of discounting it, merely advanced \$50 on it, he can only recover \$50. If C discount the bill, and pledge it with D for \$50, D

Total failure, as against an immediate party, is a good defense, but not as against a remote party who is a *bona fide* holder for value without notice. Thus where the consideration of the note was that the payee should act as executor for the maker, and the payee died first, the note could not be enforced against the maker. So where a bill is drawn by one party on another payable to his own order, and is accepted, if the consideration fails as between these two, an indorsee for value who knows that the consideration has failed cannot sue the acceptor. (Starr v. Torrey, 2 Zab., 190.) Partial failure of consideration is a defense *pro tanto* against an immediate party when the failure is an ascertained and liquidated amount in money. But it is not a defense against a remote party holder for value. (Tiedeman, Com. Pap., Sec. 201; Stevens v. Campbell, 13 Wis., 419.) A few decisions hold that a partial failure of consideration will not constitute a good defense in any case whether definite or indefinite. (Fletcher v. Chase, 16 N. H., 38; Briggs v. Boyd, 137 Vt., 534.) Statutes in Colorado, Florida, Georgia, Illinois, Indiana, Iowa, New Hampshire and Vermont allow a partial failure of consideration to be set up as a defense as between the parties. (2 Randolph Com. Pap., 540 n)

Where the consideration is illegal in whole or in part it is a defense against the entire note while in

can recover \$100 from B, and he will hold \$50 thereof in trust for C." (Benj.'s Chalmers, B. N. and Checks, Art. 91; Hilton v. Smith, 5 Gray, 402.)

the hands of an immediate party or one who is not a *bona fide* holder for value without notice. (Shirley v. Howard, 53 Ill., 455.) In general the consideration for a bill is illegal when it is wholly or in part immoral, contrary to public policy, or forbidden under penalties by statute.*

A distinction is to be made between a consideration simply illegal and one which by statute expressly makes the bill void. In the former case a *bona fide* transferee may recover, though not in the latter. (Boughner v. Meyer, 5 Col., 71)

Where a bill is given for a consideration which the statute expressly makes void, the party who gave the paper may set it up as a defense against all holders whether immediate or remote, but the holder can sue the indorser. (Eagle v. Cohen, 84 Ill., 292; Armstrong v. Gibson, 31 Wis., 66.) It is no longer customary by law to make notes expressly void by statute, and where such statutes do exist a clause frequently saves the rights of innocent holders. (Benj.'s Chalmers, B. N. & Checks, Art. 96 n.) The holder of commercial paper is *prima facie* presumed to be an innocent holder for value, but where there is evidence affecting the bill or note with fraud or illegality, the burden of proof is shifted to the holder to show that he is an innocent holder for value. (Sperry v. Spalding, 45 Cal., 544; Bank v.

*Thus Tiedeman mentions among illegal considerations, the compounding of crimes and misdemeanors, contracts in aid of rebellion or an alien enemy, the bribing of a public officer, wagers, options or "futures," restraint of trade, restraint of marriage, usury, etc. (Com. Paper, Secs. 183-196.)

Gilliland, 23 Wend., 311.) In case the holder can show that he paid full value, the defendant must then show that the holder had notice of the fraud or illegality. So it is held that where the holder has in good faith given part value he may recover to a like amount. (Dresser v. Missouri, 93 U. S., 92.)

Sec. 793. FRAUD OR DURESS AS AFFECTING THE CONSIDERATION.—Where the consideration for a bill is clearly fraudulent it is a good defense against an immediate party or a remote party unless he is an innocent holder for value, and while the instrument is yet in the hands of a party with notice a court of law will compel its surrender, or restrain its negotiation until the question of fraud is settled. (Joyce on Injunctions, p. 369; Jones v. Lane, 3 Y. & C., 293.)

A bill is affected with fraud when the issue or any subsequent negotiation of it is obtained by fraud, or coercion, or when it is negotiated in breach of faith, or in fraud of third parties. (Segrum v. Prescott, 69 Me., 376.) The defendant should not retain any part of the consideration. (Heaton v. Knowlton, 53 Ind., 357.)

No holder of a bill subsequent to its being affected with fraud can enforce payment from any party thereto, or retain the bill against the rightful owner unless he is a *bona fide* holder for value without notice. (Alsager v. Chase, 10 M. & W., 576.)

CHAPTER V.

ACCEPTANCE AND TRANSFER CONSIDERED.

Sec 794. **THE PURPOSE OF ACCEPTANCE.**—The drawee of a bill is not bound as a party to the instrument until he has accepted it, or agreed previously to pay it, and cannot be sued by the holder of the bill, though he has funds in his hands to cover the bill, except where the bill constitutes an equitable assignment of the fund drawn against. (*Mandeville v. Welch*, 5 Wheat., 277) So due presentment for acceptance by the holder is a condition precedent to the exercise of rights against the other parties to the bill arising when the bill is dishonored by non-acceptance. The purpose of acceptance then is to bind the drawee and make him an actual and bound party to the instrument, which he is not until he has accepted. (*Swope v. Ross*, 40 Pa. St., 186.)

Sec. 795. **MEANING AND EFFECT OF ACCEPTANCE.**—When the drawee has accepted the bill it means that he has bound himself to pay the bill according to its tenor, and he thus replaces the drawer as the primary debtor to the holder, and relieves him from responsibility as a guarantor that the acceptor will pay when due. Upon paying the bill the acceptor can charge the amount of same to

the funds of the drawer in his hands, or if none, can recover from him by action. (*Planters' Bank v. Douglass*, 2 Head., 699; *Smith v. Muncie Bank*, 29 Ind., 158.)

Sec. 796. **BILLS THAT MUST BE PRESENTED FOR ACCEPTANCE.**—All bills payable on a future date, or a specified time after date, or on demand, need not be presented until they mature and are payable. But such bills may be presented before due to ascertain if they will be honored, and if this is done and acceptance refused, the bill is dishonored and must be protested. (*Philpott v. Bryant*, 3 C. & P., 244; *Allen v. Suydam*, 20 Wend., 321.) In case of bills payable at sight, or a specified time after sight, or after any uncertain event, presentment for acceptance must be made without unreasonable delay to bind the other parties to the bill. (*Tiedeman*, Com. Pap., Sec. 211; *Cox v. National Bank*, 100 U. S., 704.)

A failure to present in the proper time and manner by the holder of a bill, will destroy its effect as against all the parties, and also cancel the claim settled by the bill. Presentment is a duty which the holder owes to the other parties to the instrument, as they expect the bill to be accepted and paid by the drawee. (*Gracie v. Sandford*, 9 Ark., 238; *Smith v. Miller*, 43 N. Y., 171.)*

*"Presentment for acceptance is necessary in the case of a bill of exchange payable at or after sight. In other cases, in the absence of express stipulation, it is optional." (*Benj.'s Chalmers*, B. N. and Checks, Art. 147.)

Sec. 797. PRESENTMENT, HOW MADE.—Any person in possession of a bill of exchange may present it for acceptance, or may do so through his properly authorized agent. (*Freeman v. Boynton*, 7 Mass., 483.) The presentment must be made to the drawee personally or to some person who has authority to accept or refuse to accept for him. (*Sharpe v. Drew*, 9 Ind., 281.) A bill on a firm may be presented to any one of the partners, otherwise in case of two or more drawees not partners. (*Holtz v. Popple*, 37 N. Y., 634; *Bank v. Willis*, 8 Met., 504.) If drawee is dead presentment must (perhaps) be made to the executor or administrator. (*Chitty on Bills*, Sec. 280; *Contra, Daniels*, Sec. 458.) By statute in California, Utah and the Dakotas, presentment may be made to one in charge of the place of business or residence of the drawee in case of his absence.

The bill should be presented to the drawee at his domicile, either at his residence or place of business, and in case of a regular business place it is the more customary place. (*Tiedeman, Com. Pap.*, Sec. 213.) When the residence or place of business cannot be found after diligent search, or his new residence in case of removal, the bill may be protested as though refused acceptance. (*Chitty on Bills*, 317.)

Presentment should be made on a business day and at reasonable hours of business. What constitutes reasonable hours of business depends upon the custom of the particular place and also upon the

trade or business. (Nelson v. Fotterall, 7 Leigh, 179.) Any hour before the customary hour of retiring will be sufficient when presented at drawee's residence. (Dana v. Sawyer, 22 Me., 244.)

The time within which the holder must present a bill for acceptance which requires such presentment, is usually stated to be a reasonable time, and this is a mixed question of law and fact. (Walsh v. Dart, 23 Wis., 334.) When the facts are plain and simple reasonable time for presentment is a question of law, while complicated circumstances make it a question for the jury. (Prescott Bank v. Caverly, 7 gray 217.) The facility of communication between the domiciles of holder and drawee; the distance; the facility of getting exchange; sickness; war; and other circumstances not to be overcome by due diligence of the holder, will affect the time allowed for presentment for acceptance. So the holder of a bill of exchange payable at or after sight instead of presenting within a reasonable time may negotiate it away, and this will relieve him, as the bill is intended to circulate. But this cannot go on indefinitely and will only affect the question of reasonable time.*

*"In the following cases the delays were held to be reasonable; four days, drawn in country on London, Shute v. Robins, 3 C. & P., 80; bill drawn in Erie, Pa., on New York City, delay eleven days; Banking Co. v. 2d National Bank, 63 Pa. St., 404; drawn in New Orleans on Liverpool, ten weeks, Bolton v. Harrod, 9 Mart., 326; drawn in Dakota on Chicago, thirty-five days, Montelius v. Charles, 76 Ill., 303; drawn in Toronto on New York, three months, Boyes v. Joseph, 7 U. C., Q. B., 505; drawn in London on Calcutta, seventy-eight days, Muilman v.

The drawee may demand of the holder of a bill who seeks acceptance of it, that the bill be exhibited to him, and in this case the holder must have the bill with him in order to make a good presentment, and the drawee may take it into his possession and retain it twenty-four hours for examination and identification. But where the drawee refuses acceptance of a bill from its description the holder need not exhibit it.*

The presentment must be final, and the notary must not agree to call again with it on another day. And in case of duplicate bills the drawee should accept but one, or he will be liable to *bona fide* holders of each accepted bill. (Bank v. Neal, 22 How., 96, 109.)

Sec. 798. PRESENTMENT, WHEN EXCUSED.—Presentment for acceptance is excused

D'Eguino, 2 H. Bl., 565. On the other hand, it was held to be unreasonable delay of presentment for acceptance, where the bill was drawn in Detroit on Chicago, twenty-one days delay, Phoenix Ins. Co. v. Allen, 11 Mich., 30; drawn in Wisconsin on New York, fourteen days, Walsh v. Hart, 23 Wis., 334; drawn in Ohio on New York, ten days, Vantrot v. McCullough, 2 Hilt, 272, etc." (Tiedeman, Com. Paper, Sec. 216n.)

*In many of the States the time is fixed by statute during which the drawee may retain the bill for examination, and is customarily 24 hours.

"The person who presents a bill of exchange for acceptance must deliver it to the drawee if required to do so. The drawee is entitled to retain it for twenty-four hours, but after the expiration of this time he must re-deliver it accepted or unaccepted. (Case v. Burt, 15 Mich., 82.) In reckoning the twenty-four hours non-business days must be excluded. If after the expiration of the twenty-four hours the drawee refuses to re-deliver the bill it must be treated as dishonored in order to preserve the holder's right of recourse against antecedent parties." (Benj.'s Chalmers, B. N. & Checks, Art. 154.)

and the bill should be protested as dishonored by non-acceptance: (1) When the drawee is discovered to be a fictitious person, or is incapable of making a valid contract from legal disabilities, or is the drawer, as a partner in the firm which is drawee, or officer of a private corporation which is drawee. (Tiedeman, Com. Pap., Sec. 218.) (2) Where, after reasonable diligence to ascertain the drawee, the presentment cannot be effected. (Byles, 12th ed., p. 183; Chitty, p. 199.) (3) When the drawee is not in funds, and the drawer has no reasonable expectation that the bill will be accepted. (Robinson v. Ames, 20 Johns., 146.) (4) Where the bill contains a clause waiving acceptance, but not because the drawer has countermanded the bill. (Daniel, Sec 450.)

Sec. 799. THE ACCEPTANCE CONSIDERED.—Generally speaking, no one but the drawee can accept a bill, and a stranger accepting will either not be bound at all or, if there is sufficient consideration, as a guarantor (Keenan v. Nash, 8 Minn., 409; Story on Bills, Sec 254.) This does not apply to bills in blank, and a case of need may accept. So an authorized agent of the drawee may accept, but unless the agent furnishes clear evidence of authority the holder may protest the bill for non-acceptance. The acceptance may be made before the bill is drawn or while still incomplete, but is usually made a reasonable time after execution. Where the acceptance is made in blank and

delivered to be filled up a *bona fide* holder for value may enforce it against the acceptor. The acceptance may be made after the bill has matured and been protested for non-payment, and is then payable on demand.

The holder may require that the date of acceptance be written on the bill so it will appear from the face of the instrument when it is due. (Daniel, Sec. 395.) Where the date is not indorsed on the bill it may be proven and is presumed to have been made prior to the date of payment and within a reasonable time after the bill's execution. (Tiedeman, Com. Pap., Sec. 220.)

The acceptor or drawee who has not communicated his acceptance or the accepted bill to the holder, may revoke an acceptance before delivery and cancel the written acceptance. Unless required by statutes, which is usually the case, or requested by the holder, the acceptance may be written or verbal. Many States require the acceptance to be in writing and signed by the acceptor. The fact that the statute of frauds, respecting a promise to answer for the debt of another, is held by some authorities, makes it desirable that all acceptances be in writing. But where the drawee has funds of the drawer in his possession it is held to be the payment of his own debt, and the acceptance is not within the statute of frauds. (Townesley v. Sumrall, 2 Pet., 170.)

The usual form of acceptance is made by writing the word "accepted" on the face of the bill, and the

signature of the acceptor, and by statute in a number of States the signature is required. But an acceptance is good at the common-law merchant without the signature. (Phillips v. Frost, 19 Me., 77.) So any form of expression as "presented," "seen," "honored," "payment guaranteed," and the like expressions, indicating the intent to accept, will take the place of the formal expression "accepted." (Tiedeman, Com. Pap., Sec. 223.)

So an acceptance will be implied from conduct of the drawee inconsistent with a refusal to accept, as where he discounts paper made for his accommodation, or makes part payment and arranges to pay the balance. (Bank v. Woodruff, 34 Vt., 89; Andressen v. Bank, 2 Fed. Rep., 125.)

Sec. 800. ACCEPTANCES FOR HONOR, OR SUPRA PROTEST.—When the drawee has refused to accept a bill and protest has been made and notice given to all the parties, any third person may then accept the bill for the honor of one or several parties to the bill. The acceptor after protest (*supra protest*) should specify for whose honor he accepts it, or it will be presumed to be for the honor of the drawer. The acceptance for honor enures to the benefit of all parties for whose honor it was accepted. (Markham v. Hazen, 48 Ga., 570; 1 Parsons' N. & B., 313.)

The holder is not bound to take an acceptance for honor, but by doing so he loses the right to sue the parties for whose honor it was accepted until

maturity, and refusal of payment by the acceptor for honor.

An acceptance for honor is properly made by the acceptor appearing before a notary public and declaring his intention to accept for the honor of some one or more of the parties and subscribing to some such expression of his intention as "accepted for the honor of A." (Daniel, Sec. 523.) The acceptance for honor is not absolute. "In order to make such an acceptor liable, the bill must be again presented to the drawee at maturity, notwithstanding his refusal to accept, so that he might pay the bill, if he saw reasons for changing his previous determination. If he refuses, the bill should be protested, and then presented to the acceptor for honor. And if the acceptor for honor refuses to pay the bill, it should be again protested, and in this protest all the steps that had been taken to secure the payment of the bill should be stated, and then notice should be given to all the parties for whose honor the bill had been accepted." (Tiedeman, Com. Pap., Sec. 228; 1 Parsons' N. & B., 320.) The date of maturity will be ascertained from the date of acceptance and not from presentment in case of acceptance for honor. The acceptor must notify the parties for whose honor he accepts, and of his payment of the bill, and if this is done within a reasonable time he will have recourse against such parties. He will only have recourse against parties prior to the one for whose honor he accepts. (*Gazzam v. Armstrong*, 3 Dana, 554.)

Other forms of conditional acceptance occur in business, and if the holder consent to take such a qualified acceptance he must give notice of the qualification to antecedent parties and get their consent, otherwise he runs the risk of freeing them from their liability. (*Crowell v. Plant*, 53 Mo., 135.)*

Sec. 801. PRESENTMENT FOR PAYMENT CONSIDERED. — The rules already considered apply both to presentment for acceptance and presentment for payment, but it is thought best to give a few principles applicable to presentment for payment at this time.

When a bill of exchange has been dishonored by non-acceptance the holder has the option to present for payment or not, except when accepted *supra protest*. (*Read v. Adams*, 6 Serg. & R., 356.) In other cases due presentment of a bill of exchange to the drawee for payment is necessary to bind the drawer and indorsers. By due presentment is meant such a presentment as regards time, place, and other circumstances as has been discussed in this chapter. The holder must demand payment according to the tenor of the bill. When payable at a determinable time it should be presented upon that day subject to

* "The following may be mentioned as illustrative examples of conditional and qualified acceptances: 'To pay when goods consigned to me are sold,' (*Smith v. Abbott*, 2 Stra., 1152); 'to pay as remitted for'; 'to pay when cargo of equal value is consigned to me'; 'payable when house is ready for acceptance,' (*Cook v. Wolfendale*, 105 Mass., 401)." (*Tiedeman, Com. Paper*, Sec. 227.)

grace and usance of trade; and when payable on demand it must be presented within a reasonable time. (Byles, p. 211.) When a bill is made payable at a particular place by the drawer of a draft or by the acceptor in a general acceptance, presentment for payment must be made at that place. The person who presents the bill should produce it and be ready and willing to surrender it on receiving payment. In case the bill is lost presentment of a copy with a bond of indemnity would be valid. (Lane v. Bank 9 Heisk., 419.) And a protest may be made on a copy of the lost instrument. (Brooks's Notary, 4th ed., pp. 137, 217.)

A bill is said to be dishonored by non-payment, when it is duly presented for payment and payment refused or cannot be obtained; or when presentment for payment is excused, and the bill is overdue and unpaid. The holder of a bill dishonored by non-payment, by taking steps to protest the bill acquires right of recourse against all antecedent parties to the bill.

When a bill is payable generally or at a particular place no presentment is necessary to charge the acceptor, as it is his duty to be on hand to pay or seek out his creditor to pay him. (Dougherty v. Bank, 13 Ga., 288.)

TRANSFER.

Sec. 802. IN WHAT WAYS BILLS AND NOTES MAY BE TRANSFERRED.—As a bill or note is a chattel it may be sold as a chattel; it is

also a chose in action and can be assigned as a chose in action, and as it is also a negotiable instrument it may be transferred by indorsement according to the rules of the law merchant.

Sec. 803. TRANSFER BY ACT OF LAW.—At common law the title to a bill of a married woman during marriage was in the husband, if he died it reverted to her. (*Draper v. Jackson*, 16 Mass., 480.) This rule does not apply to a bill forming part of wife's separate estate, and now quite generally by statute a married woman has the rights of a *feme sole*. (See this subject discussed in No. 3 of The Home Law School Series.)

On the death of a holder the title passes by act of law to his personal representatives. And upon the death of a joint payee the law passes the title to the survivor or survivors. (*Wheeler v Wheeler*, 9 Cow., 34.)

Sec. 804. TRANSFER BY ASSIGNMENT.—The holder of a bill may transfer it by assignment the same as any other chose in action. Where the holder of a bill payable to order transfers it without indorsement it operates as an equitable assignment, and the transferee may compel indorsement. (*Matteson v. Morris*, 40 Mich., 55.)*

*"C, the holder of a bill payable to order, transfers it to D for value without indorsing it. D cannot sue the acceptor in his own name, or negotiate the bill by indorsing it to E." (*Benj.'s Chalmers, B. N. & Checks*, Art. 104; *Hull v. Conover*, 35 Ind., 372.)

When indorsement is subsequently obtained the transfer operates as a negotiation from the time when given, unless the indorsement was omitted at the time of transfer by fraud, accident or mistake, in which case it operates from the time of the transfer. (Lancaster Bank v. Taylor, 100 Mass., 18.)

The holder of a bill, but not the maker of a note, may deliver it by way of gift in contemplation of death, and die, and it will operate as a valid *donatio mortis causa*. But the estate is not liable on the donor's indorsement. (Weston v. Hight, 17 Me., 287.)

Sec. 805. TRANSFER BY NEGOTIATION, ITS MEANING.—“Negotiation” means the transfer of a bill in the form and manner prescribed by the law merchant with the incidents and privileges annexed thereby, i. e.:

1. The transferee can sue all parties to the instrument in his own name, and, if an innocent holder, be free from all defenses unknown to him and not appearing on the face of the note.

2. The consideration for the transfer is *prima facie* presumed.

3. The transferor can under certain conditions give a good title, although he has none himself.

4. The transferee can further negotiate the bill with the like privileges and incidents. (Benj.'s Chalmers, B. N. & C., Art. 106)

We have seen in the previous chapters that to make a bill or note negotiable it must contain

express words making it negotiable, and these words of negotiability were there discussed. (Sec. 755 et seq. Ante.)

When the bill is made negotiable in its origin, the absence of words implying power to transfer will not limit the negotiable effect of such indorsement. (*Leavitt v. Putman*, 3 N. Y., 494.)

Having the other requisites a bill is negotiable which is payable in legal effect either to order or to bearer. It is payable to bearer when so stated or when indorsed in blank. And a bill lacking words of negotiability, but containing an expression as "this bill is to be negotiable," indicating that it was the intention of the parties to make it negotiable, will be negotiable. (*Parker v. Middleton*, 29 Pa. St., 530.)

Sec. 806. **NEGOTIATIONS BY DELIVERY AND BY INDORSEMENT.**—There are two modes of negotiation, by delivery and by indorsement according to the form of the instrument transferred. Thus, a bill which in legal effect is payable to bearer, may be negotiated by delivery alone. It may also be indorsed and makes the indorser a guarantor of the instrument, and such indorsement may be struck out without affecting the negotiability of the paper. A bill in legal effect payable to order is negotiated by indorsement.* But indorse-

*"Indorsement means a writing on a bill signed by the holder, ordering the amount to be paid to a person therein designated, or to his order, or to bearer." (*Benj.'s Chalmers*, B. N. & C., Art. 111.)

ment must be completed by delivery of the instrument, and the term usually implies delivery.

The indorsement must be written on the bill itself, or on a copy, or on a slip of paper attached thereto called an "Allonge," and considered a part of the bill. The indorsement may be on the face of the bill.

Sec. 807. KINDS OF INDORSEMENTS.—An indorsement may be in blank or a general indorsement, in which case the bill is transferable by delivery alone, or it may be a special or full indorsement designating the person to whom or to whose order the bill is thereby made payable, and then can only be negotiated by such person's indorsement.

The holder of a bill with a blank indorsement, may, by writing a name over the indorser's signature convert it into a special indorsement, but such a bill is not restrained thereby and is payable to bearer, except that the special indorser is only liable to parties making title through his indorsement. (Johnson v. Mitchell, 50 Tex., 212.)

Sec. 808. QUALIFIED, CONDITIONAL AND RESTRICTIVE INDORSEMENTS. — As every indorsement consists of two distinct contracts, unless otherwise stipulated, the present transfer or negotiation of the bill, and the assumption of a future contingent liability to pay same as an indorser, it is necessary for the indorser to limit or qualify his second contract of future liability, and this may be done without affecting the negotiability of the paper.

Thus the indorser may put in the indorsement, "pay D or order, without recourse on me," or "sans recours," or the like, and then he transfers his title just the same but incurs no liability as an indorser.

The indorser may also waive a right he may have as an indorser and thus enlarge the right of the holder. This is called a facultative indorsement, and does not affect the negotiability of the bill. So the indorser may insert a reference to a case of need in the indorsement.

By a conditional indorsement is meant that the indorser makes his liability as a party depend upon the fulfillment of the condition stated. Thus where the bill reads, "Pay D or order upon my name appearing in the Gazette as ensign in any regiment between the 1st and 64th, if within two months from this date," and the acceptor pays the bill without the condition being fulfilled, he is liable to the indorser for the amount of the bill. (Story, Sec. 217; *Robertson v. Kensington*, 4 Taunt., 30.) But such indorsements are of doubtful validity.

A restrictive indorsement makes the indorsee the holder of the bill, but states that he is not the beneficial owner. It gives authority to deal with the bill as directed, but does not transfer the ownership. The indorsee cannot transfer his rights unless expressly authorized in the restrictive indorsement.* He may sue and collect the bill.

*Illustrations of restrictive indorsements given by Benjamin are: "Pay D or order for the use of X," "pray pay the money to my use," etc. (Art. 124.)

A mere statement in the indorsement that the value was furnished by another will not make it restrictive. (Potts v. Reed, 6 Esp., 57.)

When the restricted indorsee has the right to indorse the bill his indorsee takes affected by the same restrictions, the relation between indorser and indorsee being that of principal and agent. (Treuttel v. Barandon, 8 Taunt., 100.)

Sec. 809. WHO MAY NEGOTIATE A BILL.—In general a bill must be negotiated by the *de facto* holder, that is, the person in possession of a bill and to whom it is payable, whether his possession be lawful or not. And in such sense it is broader in significance than the term "holder," which customarily means lawful holder. If the bill is payable to bearer the person in possession is the *de facto* holder, but if the bill is payable to order the *de facto* holder must have possession and be the person to whom it is payable. But if the name is misspelled, or wrongly designated, the holder may negotiate by writing the name as in the bill, and then his true name. (Bryant v. Eastman, 7 Cush., 11; Redmond v. Stansbury, 24 Mich., 445.) So the person who obtains title by transfer by act of law is a *de facto* holder. But two or more persons to whom a bill is payable, not being partners, must each indorse the bill, unless one has authority to indorse for all. (Ryhiner v. Feickert, 92 Ill., 305.)

Sec. 810. TO WHOM A BILL MAY BE NEGOTIATED.—A bill may be issued to any per-

son, including the drawer, drawee, acceptor or prior indorsers, and may be reissued by such indorsees. But in case a bill is indorsed back to a party already liable thereon, he cannot sue the intermediate parties, and in case it is indorsed to the acceptor at or after maturity it is discharged. (Bank v. Thompson, 124 Mass., 515.) A special indorsee should be designated with the same certainty as in the case of an original payee. (Murray v. East India Co., 5 B. & Ad., 204.)

Sec. 811. WHEN A BILL MAY BE NEGOTIATED.—While a complete bill may be negotiated at any time before it is discharged, the character and incidents affecting it depend on the time when it is negotiated, as, for example, whether indorsed before or after due. *Prima facie* the bill is presumed to have been negotiated when issued or before maturity, and this presumption may be rebutted by suspicious circumstances. (Anderson v. Weston, 6 Bing., N. C., 296; Bounsall v. Harrison, 1 M. & W., 611.)

Sec. 812. SAME SUBJECT—OVERDUE PAPER.—A bill that is overdue, that is, whose time of payment has matured, and is not discharged may be negotiated as other bills, except that the fact of its being overdue is equivalent to notice to the holder of all facts which, if known before maturity, would destroy his title as a *bona fide* holder without notice. This characteristic of overdue paper is

called an "equity attaching to the bill." (Kittle v. DeLameter, 3 Nebr., 325; Natl. Bank v. Texas, 20 Wall., 72.)

Bills payable in installments are considered overdue in toto, when any installment is past due, but not from the fact that interest is past due. (Field v. Tibbetts, 57 Me., 358; Kelley v. Whitney, 45 Wis., 110.) A bill of exchange payable on demand and not dishonored by non-acceptance is not overdue unless it appears on its face to have been in circulation an unreasonable time. (La Due v. Bank, 31 Minn., 33.) Bills payable on demand are overdue after the expiration of the last day of grace. (Chambiss v. Matthews, 57 Miss., 306.) The holder's title after maturity will be as good as that of the previous holder, in case of a defective title in one of the parties. (Hereth v. Bank, 34 Ind., 380.)

The existence of a set-off or matter of counterclaim against the holder of a bill is not an equity which attaches to an overdue bill. (Richardson v. Daily, 34 Ia., 427; Young v. Schroner, 80 Pa. St., 463.) But this principle is denied by other authorities. (Armstrong v. Chadwick, 127 Mass., 156; Pugh v. Grant, 85 N. C., 39.) But if the transfer was without consideration, or in violation of an agreement not to negotiate after maturity, the equity attaches. But the lack of consideration as between an accommodation maker and the holder is not an equity attaching to the instrument. (Davis v. Miller, 14 Grat., 1; contra, Kellogg v. Barton, 12 Allen, 527.) Payment and other forms of dis-

charges disentitle the holder after maturity, but these are rather regarded as grounds of nullifying the instrument than as equities attaching to the bill. Part payment is regarded as an equity attaching to an overdue bill.*

Sec. 813. LIABILITY OF THE INDORSER AND RIGHTS OF THE INDORSEE.—By negotiation the indorser warrants that the paper is a valid obligation in every particular, as that the parties are competent to contract, the genuineness of all the signatures, and that the paper is not in violation of the law for any reason; and further he guarantees by a full indorsement, that the paper will be honored by acceptance and payment, and for this guaranty he is liable to each subsequent indorsee. These rights inure to the *de facto* holder of the bill, and he can sue upon the bill or further negotiate it, and though guilty of a fraud in parting with it, give title to a *bona fide* holder for value without notice

*Graves v. Key, 3 B. and Ad., 319; Lanati v. Bayhi, 31 La. Ann., 229. "The position of a holder who takes a bill when overdue is this: he is a holder with notice. He may or may not be a holder for value, and his rights will be regulated accordingly. He is a holder with notice for this reason: he takes a bill which, on the face of it, ought to have got home and to have been paid. He is therefore bound to make two inquiries: 1. Has what ought to have been done really been done, i. e., has the bill in fact been discharged? 2. If not, why not? Is there any equity attaching thereto? i. e., was the title of the person who held it at maturity defective? If his title to the instrument was complete, it is immaterial that for some collateral reason, e. g., set-off, he could not have enforced the bill against some one or more of the parties liable thereon." (Benj.'s Chalmers B. N. and Checks, Art. 134n.)

who takes it before maturity. Any irregularity, as a torn paper, patent on the face of a bill is equivalent to notice, and the holder who takes such an instrument will not be considered an innocent holder. (Ingham v. Primrose, 7 C. B. N. S., 82.)

In an action by the *de facto* holder it may be shown that he holds adversely to the true owner, and that he is agent or trustee for another person, and then any defense or set-off available against such person is available against the holder. (Benj.'s Chalmers, B. N. & C., Art. 141.)

An action at law may be maintained upon a lost bill, when it is shown to have been destroyed; or that it has come into the possession of the defendant since its loss; or that the defendant is protected from future liability by the statute of limitations. This action upon lost instruments is now regulated in England and some of the States by statute. The holder has also a remedy in a court of equity by giving a bond of indemnity against future liability on the bill. (Torrey v. Foss, 40 Me., 74; Hagerstown v. Adams Ex Co., 45 Pa. St., 419.)

CHAPTER VI.

DUTIES OF THE HOLDER.

Sec. 814. IN GENERAL.—The duties of the holder of a bill include presentment for acceptance, presentment for payment, protesting for non-acceptance or non-payment, the giving notice of dishonor to all parties secondarily liable on the instrument whom he desires to hold liable, and the delivery of the paper on receiving payment. In the preceding chapter we have discussed at more or less length the subjects of presentment, whether for acceptance or payment, and to this the student is now referred.

Sec. 815. HOW TO ASCERTAIN THE PROPER DATE FOR PRESENTMENT.—In computing time on all commercial paper the day of date is excluded, so where the paper is payable one year from date it will mature on the first anniversary of that date. Where days of grace are allowed the date of maturity will be three days later, on the last day of grace. (Henry v. Jones, 8 Mass., 453.) When the term month is used it is held to mean a calendar month and not a lunar month. In an instrument payable a stated number of days after sight, or after date, the day of sight or date is excluded and the day of payment included in the computation.

Presentment for payment cannot be made on a Sunday or legal holiday, in such case, and when days of grace are not allowed, the note maturing on a holiday or Sunday, as the maker cannot be compelled to pay sooner than he had promised, the note or bill will have to be presented on the next business day. But where days of grace are allowed and the last day of grace is a holiday, the demand should be made on the preceding day, since these days are a matter of indulgence to the maker or acceptor in their origin. (*Barrett v. Allen*, 10 Ohio, 426; *Shepherd v. Spates*, 4 Md., 400.)

Sec. 816. **MODE OF PRESENTMENT.**—As a general rule the presentment is made by the holder or his agent presenting the bill to the acceptor and demanding payment. But where the bill is payable at a bank, it is sufficient if the paper is there in possession of one entitled to receive payment. By usage the banks in some States give notice to the promisor a few days before maturity of the fact that the paper will be due on a named day, and it has been held that this preliminary notice will take the place of a formal presentment on the day of maturity. (*Weld v. Gorham*, 10 Mass., 366.)

PROTEST.

Sec. 817. **MEANING AND PURPOSE OF PROTEST.**—"Protest" means a formal notarial certificate attesting the dishonor of a bill. It must be made by a notary public or other person authorized to act as such, except where a notary cannot be

obtained, in which case it may be made by any respectable person in the presence of two witnesses. (*Burke v. McKay*, 2 How., 66.)

The purpose of the protest and certificate is to furnish legal evidence of the fact that proper demand had been made upon the promisor and notice of dishonor given in a suit by the holder against the prior parties. It does away with the necessity of witnesses to prove these facts, and being so much more expedient in cases of foreign bills, it has long been the universal rule of the law merchant in England and America that such bills must be protested in order to hold the prior parties. Inland bills, or domestic paper, being of easier proof, unless the statutes require it, need not be protested for non-payment, and protest of such paper independent of statute would have no effect. (*Daniel*, Sec. 927.)* The convenience of proving the essential facts of dishonor by notarial certificate has caused the enactment in most of the States of statutes requiring or permitting the protesting of inland bills and notes. (*Tiedeman*. Com Pap., Sec. 321.)

When a foreign bill of exchange is dishonored it must be duly protested for non-acceptance or non-payment, as the case may be in order that the holder may preserve his right of recourse against the

*If the holder has paper protested for non-payment when the law merchant or statutes do not require or allow protest, the notary public cannot recover his fees of the parties to the paper. (*Cramer v. Eagle Mfg. Co.*, 23 Kan., 400.)

drawer and indorsers. This is indispensable. (*Union Bank v. Hide*, 6 Wheat., 572.)

If a bill of exchange is dishonored by non-acceptance, and the holder without proper excuse neglects to protest it, the drawer and indorsers are discharged as regards such holder and all subsequent holders, who have knowledge that the bill has been dishonored, but such parties are not discharged as regards a holder who takes such a bill before maturity and without knowledge of its dishonor. (*Benj.'s Chalmers, B. N. & C., Art. 181.*) So a bill dishonored for non-acceptance must be protested, but when this is done it need not be subsequently protested for non-payment. (*Whitehead v Walker*, 9 M. & W., 516.)

Sec. 818. **NOTING, OR PREPARATION FOR PROTEST**—As we have seen (Chapter V), any holder may present the bill or note for payment and receive payment, but in case payment is refused and protest becomes necessary, the notary public who makes the protest is obliged by law to make a second demand, so that he can of his personal knowledge certify to the fact of dishonor. In England the preliminary presentment is made by the notary's clerk, but in America such a presentment is insufficient unless authorized by statute or custom of the place. (*Bank v. Barnum*, 49 N. Y., 275; *Cribbs v. Adams*, 13 Gray, 597.)

"Noting" means a minute made by the notary public on a dishonored bill at the time of its dis-

honor. The "noting" consists merely of the notary's initials, date, charges, and cause of dishonor, as "no effects," and may be made on the back of the instrument or on a ticket attached to it (Brooks' Notary, 4th ed., pp. 80-82.) This noting of the dishonor is for the convenience of the notary, who by the law merchant is required to make the protest on the same day that the presentment and demand were made, and this short form or "noting" is equivalent to the protest itself, and the more formal protest may be made out later from the "noting." The notary is not allowed to trust his memory, and if the dishonor is not protested or noted on the same day, the drawer and indorsers will be discharged. (Tiedeman, Com. Pap., Sec 325; Dennistoun v. Stewart, 17 How., 606; Chitty on Bills, 377.)*

Sec. 819. WHAT THE CERTIFICATE OF PROTEST SHOULD CONTAIN.—The protest certificate should contain a copy of the bill or the bill itself annexed; a statement of the parties for whom and against whom the instrument is protested; the date of protest and the place where made; a statement that acceptance or payment was demanded by the notary; the terms of the answer, if

*A foreign bill should be noted for protest on the day that it is dishonored. When a bill has been duly noted, the formal protest may be extended at any time. (Benj.'s Chalmers B. N. and Checks, Art. 178) But in practice the noting is frequently made on the day after dishonor. (Brooks' Notary Public, 80.)

any, or a statement that no answer was given, or that the drawee or acceptor could not be found; a claim for protection from the parties liable, and the signature and seal of the notary making the protest. (Brooks' Notary, 4th ed., p. 82.)

A bill must be protested at the place where it is dishonored, but if the domicile and place of payment are different it may be protested at either place. (Tiedeman, Com. Pap., Sec. 323.) When the laws are in conflict, the validity of the protest will be determined by the law of the place where it is made. (Carter v. Burley, 9 N. H., 558.)

Sec. 820. PROTEST EVIDENCE OF WHAT FACTS.—The notary's certificate of protest is only evidence of those facts which are stated therein and which are the duty of the notary to note in making presentment and demand for payment. Collateral facts noted by the certificate must be proved by other evidence. So where, as is usually the custom, the notary sends out the notices of dishonor to the drawer and indorsers, as this duty is not required of him by the law merchant, his certificate in regard to such notices being sent out is not legal evidence of the fact. But statutes in the different States usually provide that a notarial certificate of protest will be evidence of any fact therein stated in respect to notice. (Tiedeman, Com. Pap., Sec. 327.) The certificate of protest may fail to state all the necessary facts, and in such a case the missing facts are not as a rule to be supplied by implication or infer-

ence. (Bank v Smith, 11 Wheat., 171; Bradshaw v. Hedge, 10 Ia., 402.)

A protest certificate is only *prima facie* evidence, and all facts stated therein may be disproved by competent evidence showing the statements to be untrue. (Howard Bank v. Carson, 50 Md., 27.)

Sec. 821. HOW PROTEST MAY BE WAIVED OR DISPENSED WITH.—Protest is waived by waiver of a presentment for payment, and protest is dispensed with by the same circumstances which would dispense with notice of dishonor in the case of an inland bill, and circumstances excusing delay in giving notice of dishonor will excuse delay in protesting. (Moyer's Appeal, 87 Pa. St., 129.)*

Sec 822. PROTEST FOR BETTER SECURITY.—When the acceptor of a bill of exchange becomes bankrupt or makes an assignment before its maturity, it may be protested for better security. (Brooks' Notary, p. 88, form p. 219.)

When a bill of exchange is dishonored by non-acceptance or non-payment, and a reference to a case of need has been made, the holder should (perhaps) present the bill to the case of need for acceptance or payment *supra protest*, to preserve his rights against prior parties. But it is optional to do so, when the reference to a case of need is given by an

*See Post., Secs. 826-827.

indorser. (Benj.'s Chalmers, B. N. & C., Art. 184.)

So a bill must be presented to the drawee or acceptor and duly noted for protest before it can be presented to the acceptor *supra protest*; an omission by the holder to so protest the bill accepted *supra protest* will discharge such acceptor. And when dishonored by the acceptor after protest, it is held to be again necessary to protest it in order to charge the prior parties. (Chitty, p. 242; Brooks' Notary, p. 108.)

NOTICE OF DISHONOR.

Sec. 823. MEANING AND PURPOSE OF NOTICE.—Notice of dishonor means a formal notice of dishonor to parties liable on the bill, and is not excused because the drawer or indorser had notice that the bill had been dishonored. It is a duty of the holder, and a condition precedent to his being protected by previous parties, that he shall give immediate notice of dishonor by non-acceptance or non-payment to all prior parties whom he expects to hold liable. If this is not done in case of dishonor for non-acceptance the drawer and indorsers are discharged as regards the holder at the time of dishonor, and all subsequent holders with notice thereof, but not as regards a subsequent holder who takes the bill before maturity and without notice that it has been dishonored.

The failure of the holder to give due notice of dishonor for non-payment, discharges the drawer

and indorsers from liability on the instrument, and also from any liability on the consideration for which it was given. (Allen v. Eldred, 50 Wis., 136; Rucker v. Hiller, 16 East, 43; Chitty, 488.)

Sec. 824. MEANING OF DUE NOTICE; BY WHOM AND WHEN TO BE GIVEN.—By due notice is meant notice given by the proper party, in the proper form, at the proper time, in the proper manner and to the proper party.

1. The proper party to give the notice is the holder or his authorized agent, or an indorser who is at the time of giving it liable on the bill and who has a right of recourse against the party to whom notice is given. That is, the notice must be given by a party to the paper or his agent, and a total stranger cannot give proper notice of dishonor. The notary may give the notice as agent for the holder, and so may any bank holding the paper for collection. (Shedd v. Brett, 1 Pick., 401; Bank v. Vaughan, 36 Mo., 90.) By holder is meant the *de facto* holder. (Story, Sec. 303.) A party entitled to give notice may constitute the drawee or acceptor his agent for the purpose of giving notice of dishonor. (Harrison v. Ruscoe, 15 M. & W., 231; Bank v. Ryerson, 23 Ia., 508.) The notice when given by an agent may be given in his own name or the name of the principal. (Harrison v. Ruscoe, *supra*.) So if the holder be dead, notice of dishonor may be given by his personal representatives. (White v. Stoddard, 11 Gray, 258.)

Notice of dishonor given by or on behalf of the holder enures for the benefit of all subsequent holders, and all prior indorsers liable on the bill who have a right of recourse against the party to whom notice is given. (*Stafford v. Yates*, 18 Johns., 327.) And notice of dishonor given by or on behalf of an indorser entitled to give notice, enures for the benefit of the holder and all indorsers liable on the bill who have a right of recourse against the party given notice.*

2 The notice may be verbal or written, and consists in the communication of the fact of dishonor by the person whose duty it is to give it. (*Thompson v. Williams*, 14 Cal., 160.) When verbal it is not necessary to be as formal as when written, for the party may inquire if he is not fully informed. "In order that the notice may be complete, it should contain, (1) a sufficient description of the bill or note; (2) a statement that it had been presented for

*In *Beale v. Parish*, 20 N. Y., 407, it is held that notice though duly sent by the holder does not inure for the benefit of a prior indorser, unless it reaches the party to whom it is sent.

"If the holder or his agent, gives notice to the immediate indorser alone, and he (the notified indorser) then sends notices to the other prior indorsers, these prior indorsers will not only be bound to the indorsee, who gives the notice, but also to the holder. But in order that an indorser's notice may bind another indorser, the liability of the indorser giving the notice, must be fixed by having himself received the required notice of dishonor." (*Tiedeman, Com. Paper., Sec. 335.*) If he has not received this notice he is discharged from liability, and may properly be treated as a stranger to the paper. (*Id. Turner v. Leach*, 4 B. and Ald., 451.)

acceptance or payment, and had been dishonored; (3) the statement that the paper had been protested, and (4) an announcement of the intention of the holder to look to the party addressed for payment." (Tiedeman, Com. Pap., Sec. 344.)

The notice of dishonor should as a general rule indicate on its face, either by express statement or by necessary or reasonable implication, that the paper had been presented and dishonored. This is the earlier English rule, and prevails in America. (*Solarte v. Palmer*, 1 Bing., N. C., 194; *Gilbert v. Dennis*, 3 Metcalf, 495.) A statement of non-payment is not sufficient without a statement that presentment and demand had been made, but if the word "dishonored" is used it is held to be sufficient without further statement of presentment and demand. (*Page v. Gilbert*, 60 Me., 488; *Rowland v. Sprinjett*, 14 M. & W., 7.) So if an allegation of protest or words from which it may be inferred is used, as "your bill is unpaid, *noting* 5 s.," in connection with a statement of non-payment it will be sufficient. (*Armstrong v. Christiana*, 6 C. B., 687.) And in general the notice need not expressly state that the bill has been presented and dishonored, or protested, if protest be necessary, or that the party to whom notice is sent is called on to pay the bill. It is sufficient if these facts can reasonably be inferred from the terms of the notice. (*Benj.'s Chalmers*, B. N. & C., Art. 199.) And a misdescription of a bill will not vitiate notice unless the party to whom notice is given is in fact misled

thereby.* (Gill v. Palmer, 29 Conn., 54; Mills v. Bank, 11 Wheat., 431.)

3. The proper time to give notice of dishonor is as soon as the bill has been dishonored, and it must be given within a reasonable time after dishonor, and cannot be given prior to dishonor. (Story on Bills, Sec. 285; Chitty on Bills, 366-544.) Reasonable time within which to give notice may be a mixed question of law and fact, and in determining reasonable time non-business days are excluded. By the present rule of the law merchant the holder is given until the expiration of the next day after dishonor, in which to give notice; in case the holder lives in a different place from the parties notified he has until the last mail on the day after dishonor, and in case this mail leaves at an unreasonable hour, he has until the next mail to send the notices. (Lenox v. Roberts, 2 Wheat., 373; Bank v. Stedman, 3 Conn., 489.)

*"A notice to the drawer which describes the bill as payable at the 'S Bank,' when in fact it was payable at the 'T Bank,' or which describes a bill of exchange as a note, or which transfers the names of drawer and acceptor, or which describes the acceptor by a wrong name, or which misstates the sum payable, may be sufficient." (Benj.'s Chalmers B. N. and Checks, Art. 199 Ill.)

"A full description properly made, should give the date of the paper, by whom executed, payable to whom, for what amount, when due, by whom indorsed, and in the case of bills of exchange, on whom it is drawn. If payable at a particular place the place should be stated." (Tiedeman, Com. Paper, Sec. 345.) But all of this particularity is not absolutely necessary to the sufficiency of the notice, and as stated by Benjamin, Art 199, notice is sufficient which so identifies the bill that the recipient is not misled, and informs him that the bill has been dishonored by non-acceptance or non-payment, and that he is held liable.

When the person giving notice and the party to whom notice is to be given live in the same place, the notice must, in the absence of special circumstances, be *received* by such party at a reasonable hour on the day after the sender became entitled to give notice, and if such notice is to be left at a place of business it should be received during business hours. (Adams v. Wright, 14 Wis., 408.) If the notice is sent by mail it should be so sent that it will reach the party on the day after the sender became entitled to give notice; and if sent by other means than the mail it should reach the party to be notified at a reasonable hour on the same day it would have been received by due course of mail. It was formerly a general rule that when the parties to be notified and the holder lived at the same place that personal notice should be given in all cases, and a notice by mail would not be sufficient unless actually received. (Busard v. Levering, 6 Wheat., 104.) But now in case of cities in which there is postal delivery the holder is protected in case he has duly mailed a properly addressed letter containing the notice, though by the delay or default of the mail it is never received. (Bank v. Warner, 10 Allen, 522; Forbes v. Natl. Bank, 10 Nebr., 338.) And in some States statutes provide for the mailing of notices of protest where parties reside in same place. (Shoemaker v. Bank, 59 Pa. St., 83.) In cases where the parties and the holder live in different post-office deliveries, and due notice is sent by mail, the notice is sufficient though not

received. (*Munn v. Baldwin*, 6 Mass., 316; *Walters v. Brown*, 15 Md., 285.)*

4. In general, now notices of dishonor may be sent by mail, but in case personal notice should be or is sent, it must be sent to the residence or place of business of the party to be notified, delivery at either place will be sufficient, and in his absence it may be left with a person in charge, or put into the keyhole or under the door. (*Stewart v. Eden*, 2 Caines, 121; *Tiedeman*, Com. Pap., Sec. 340.)

5. The proper party or parties to be given notice are the drawer, indorser, or indorsers, or their authorized agent or other person entitled to receive notice for them. That is, the notice must be given to all persons secondarily liable whom the holder wishes to charge. And notice should be given to indorsers who have indorsed for the purpose of collection, and indorsers of overdue paper. (*Tiedeman*, Com. Pap., Sec. 336.) Where there are two or more joint drawers or indorsers who are not partners, notice of dishonor must be given to them all in order to bind either. (*People's Bank v. Keech*, 26 Md., 521.) If the drawer or indorser is a bankrupt, notice should be given to the assignee; and if the

*The holder or other party person entitled to give notice of dishonor must give notice to a remote party within the same limits of time that is required in the case of an immediate party. (*Benj.'s Chalmers B. N. and Checks*, Art. 197.) That is, the holder must give notice to all prior parties whom he desires to hold liable at the same time, and if he does not he cannot look to them unless an indorser has given the required notice in time and such notice enures to his benefit.

party sought to be notified is known to be dead the notice should be addressed to the personal representative by name if he can be ascertained, otherwise to the family residence of the deceased. (*Goodnow v. Warren*, 122 Mass., 79; *Bank v. Birch*, 17 Johns., 25.)

It is the duty of the drawer or indorsers, if absent from their place of business or residence, to see that there is some one there to receive notice on their behalf. (*N. Y. Bank v. Selma Bank*, 51 Ala., 305.)

Sec. 825. NOTICE GIVEN BY OTHERS THAN THE HOLDER.—A party who receives due notice of the dishonor of a bill, as an indorser, after the receipt of such notice, has the same time in which to give notice to antecedent parties whom he desires to hold liable, as the original holder has after the dishonor of the bill. (*Lawson v. State*, 1 Ohio St., 206.) So when a bill is in the hands of an agent, he will have the same time in which to give notice to his principal, as he would if he were an independent indorser, with his principal liable to him. (*Wright v. Shawcross*, 2 B. & Ald., 501.) If the bill is presented through the post-office for payment, the drawee or acceptor is deemed to be the agent of the holder for the purpose of giving notice of dishonor, and has the same time for giving notice as the holder would have. (*Prideaux v. Criddle*, 4 L. R. Q. B., 461; *Benj.'s Chalmers*, B. N. & C., Art. 196.)

Sec. 826. WHEN NOTICE OF DISHONOR IS UNNECESSARY.—“Notice of dishonor is dispensed with:

“1. When the drawer or indorser sought to be charged is, as between the parties to the bill, the principal debtor, and has no reason to expect that it will be honored on presentment.”* As where a person draws a bill on one who is under no obligation to accept or pay it and has not agreed that he will do so. The drawer is not entitled to notice of dishonor. (Welch v. B. & C. Mfg. Co., 82 Ill., 579.)

“2. As regards the drawer, when drawer and drawee are the same person, or identical in interest.” For example where a bill is drawn by one firm on another, and the two have a common partner.

“3. When the drawer or indorser sought to be charged is the person to whom the bill is presented for payment.”

“4. When the drawee is a fictitious person, or (perhaps) a person not having capacity to contract, and the drawer or indorser sought to be charged was aware of the fact at the time he drew or indorsed the bill.”

“5. When the drawer or indorser sought to be charged has received an assignment of all the property of the acceptor as security against his liability.” And by some authorities whenever the secondary

*The quotations in this section are from Benj.'s Chalmers Art. 200.

obligor has collateral security sufficient to satisfy the debt, whether all or only a part of the property of the acceptor, since, in such case, the secondary obligor could suffer no damage from want of presentment and notice. Tiedeman asserts the better rule to be, that the indorser or drawer in taking the collateral security should obligate himself to see the payment of the paper, in order that the taking shall relieve the holder of the duty of giving notice. (Com Pap., Sec. 362.)*

"6. When, after the exercise of reasonable diligence, notice of dishonor cannot be given to or does not reach the party sought to be discharged." As where the notice is duly posted but lost in the mail, or where the notice is duly served at the party's place of business or residence but the party is not there or any one to receive notice. (*Bank of Utica v. Bender*, 21 Wend., 643; *Mackay v. Judkins*, 1 F. & F., 208.) But the mere fact that the drawer or indorser has reason to believe that the bill will be dishonored on presentment, will not dispense with notice of dishonor. Bankruptcy or death will not

**Bank v. Griswold*, 7 Wend., 165; *Spencer v. Harvey*, 17 Wend., 490; *Duvall v. Farmers' Bank*, 9 G. and J., 31, hold that an assignment of all the property is necessary to relieve the duty of giving notice. *Watkins v. Crouch*, 5 Leigh, 522; *Bank v. McGuire*, 33 O. St., 295; *Woodman v. Eastman*, 10 N. H., 359, hold that all or a part sufficient to cover the note is sufficient; while *Bond v. Farnham*, 5 Mass., 170; *Haskell v. Boardman*, 8 Allen, 39, indicate that the drawer or indorser should be obligated to pay the debt on taking security. *Taylor v. French*, 4 E. D. Sm. (N. Y.), 458; *Wilson v. Senier*, 14 Wis., 380, deny that security by part of acceptor's property, though sufficient to meet the bill will dispense with demand, notice, and protest.

dispense with the necessity of notice being attempted to be given to the party or his representatives. (*Smalley v. Wright*, 40 N. J. L., 471.)

"7. By Waiver express or implied. Notice of dishonor may be waived before the time for giving notice has arrived, or after the omission to give notice." A waiver of notice in favor of the holder enures for the benefit of parties prior to such holders as well as subsequent holders. But waiver of notice of dishonor by an indorser does not affect prior parties. When there is an acknowledgment of liability after failure to give notice, it must be made with full knowledge of the facts to be valid. And a verbal waiver of notice may be revoked if the time for giving notice has not expired. (*Benj.'s Chalmers, B. N. & C., Art. 200.*)

Sec. 827. EXCUSES FOR DELAY IN GIVING NOTICE OF DISHONOR.—In general, delay in giving notice of dishonor will be excused when such delay is caused by circumstances beyond the control of the party whose duty it is to give notice, and not caused by his negligence. And when the cause of the delay is removed, notice should be given with reasonable diligence. Thus sickness, death, or accident to the holder about the time the note or bill matures will excuse delay for a reasonable time. (*White v. Stoddard*, 11 Gray, 258.) So where paper is sent to an agent for collection, or transferred on or near the day of maturity, delay will be excused, as to the indorser causing the

delay. (Tiedeman, Com. Pap., Sec. 361.) Where the holder does not know the indorser's address, delay caused in making inquiries will be excused. (*Fugitt v. Nixon*, 44 Mo., 295.)

Sec. 828. CONFLICT OF LAWS AS REGARDS NOTICE.—Where the instrument is drawn in one country and payable in another, and there is a conflict of laws, the validity of a notice of dishonor, both as to form and time, will (probably) be determined by the law of the place where the notice is given. (*Horne v. Rouquette*, 3 L. R., Q. B. D., 514.)

PAYMENT.

Sec. 829. DUTY OF HOLDER TO ACCEPT PAYMENT, AND DELIVER BILL.—Upon payment from the drawee or acceptor it is the duty of the holder to deliver up the bill or note, except, perhaps, upon proof of its destruction when he cannot do so. The surrender is desired as it is presumptive evidence of payment, and further that the payor may know that the bill is not in circulation. Some cases hold that the payor may demand a receipt of payment to be written on the surrendered paper, but this is doubtful authority. (*Chitty on Bills*, 13th Am. ed., 477; *Otisfield v. Mayberry*, 63 Me., 197; *Best v. Crall*, 23 Kans., 482.) The payor may also demand the right to examine the paper to ascertain the genuineness of the signatures, but the right to its surrender finally is concurrent and not a

condition precedent to payment. (Wheeler v. Guild, 20 Pick., 545.)

Payment is to be distinguished from a sale or transfer of a bill or note, as it extinguishes the liability of the party on behalf of whom the payment is made, instead of transferring the claim under it, as in the case when the parties agree that it shall be a transfer or sale. There must be a present *bona fide* intention at the time to make the transaction a sale and not a payment discharging the claim. (Greening v. Patten, 51 Wis., 150.)

Sec. 830. WHO MAY MAKE, AND RECEIVE PAYMENT.—All parties to the bill, primarily or secondarily liable to it, may make or offer payment. A mere stranger to the paper cannot make payment without the consent of the holder unless he represents a party liable thereon, or makes payment *supra protest*. A personal representative of a party is not a stranger. (Burton v. Slaughter, 26 Gratt., 919.)

The payment can only be properly made to the holder or his authorized agent or representative. This means the *de facto* holder, and a bill payable to bearer may be paid to the holder though he has stolen it. If payable to order it must then be paid to the person named in the order or his agent, and any other payment will not discharge the party paying. (2 Daniel, Sec. 1231.)

Sec. 831. EFFECT OF PAYMENT PROPERLY MADE.—A proper payment can only be made with money that is legal tender, unless by

agreement with the holder. And money that is legal tender must be taken in payment though depreciated as regards another specie of legal tender. (*Killough v. Alford*, 32 Tex., 457.) The payment must, however, correspond to the terms of the bill, and if a particular kind of legal tender is specified, as gold, the holder need accept none other.* The holder may accept in payment of the bill anything he desires, but an agent of the holder in the absence of authority can accept only money. (*DeMets v. Dogon*, 53 N. Y., 635; *Chapman v. Cowles*, 41 Ala., 103.)

The effect of payment is to extinguish the liability of the party paying in all cases, and in case he is the primary obligor all the parties to the bill are discharged, since they merely guarantee payment by such primary party; but where payment is made by a party who is not the primary obligor, or an accommodated party, his payment only cancels his own liability, and those who are obligated after him. All prior parties, primarily or secondarily liable on the bill, are liable to such a payor, and the payor may cancel indorsements subsequent to his own and re-issue the paper, and it will be valid as against the prior parties. In such case, the re-issue or indorsement must, if made after maturity, contain words of negotiability, as "to order," or "to bearer," as the transfer is a new and independent contract. (W.

**Bronson v. Rhodes*, 7 Wall, 245; *Phillips v. Dugan*, 21 O. St., 466; *McGoon v. Shirk*, 54 Ill., 408; *Smith v. Wood*, 37 Tex., 457. Contra, *Wood v. Bullens*, 6 Allen, 518; *Kilough v. Alford*, *supra*.

Boston Savings Inst. v. Thompson, 124 Mass., 506; St. John v. Roberts, 31 N. Y., 441.)

Sec. 832. PAYMENT, HOW APPROPRIATED WHEN THERE ARE TWO OR MORE BILLS.

—If the debtor is obligated to the holder on two or more instruments, and a payment is made, how shall it be applied? The following rules are deduced by Professor Tiedeman in his valuable work:

1. When the payment is voluntary, the debtor may make the appropriation as he pleases, and has until the bringing of suit to make the appropriation as regards the creditor, and a reasonable time as regards third persons.

2. If the debtor makes no specific appropriation the creditor may apply it as he pleases. Perhaps he may not apply the payment to a debt not yet due if one is due, or to a debt whose validity has been questioned by the debtor. He may apply it to a debt barred by the statute of limitations, but such application will not take the debt out of the statute as to the balance.

3. The law will make the appropriation, in case neither creditor or debtor does so, to best conform to the principles of equity, and the probable intention of the parties. Thus a debt of long standing will be paid before a later one, and interest will be paid before the principal. (Com. Pap., Sec. 377.)

Sec. 833. PAYMENT BY BILL, WHEN CONSIDERED ABSOLUTE OR CONDITIONAL.—When payment of a bill or note is made

by giving another note or bill,—other than notes treated as legal tender,—as a general rule, such payment will not be considered absolute until the paper given in payment has been itself paid, except where the parties expressly or impliedly agree that the claim shall be discharged by such payment. (Tiedeman, Com. Pap., Sec. 379.) A distinction is made by some authorities when the payor gives his own note in payment and when he gives the note or bill of another. In the first instance it is uniformly treated as a conditional payment. (*Bank of U. S. v. Daniel*, 12 Pet., 32; *McLaren v. Hall*, 26 Ia., 298.) When a stranger's note is given in payment for a precedent debt it is also generally treated as a conditional payment, but if given in satisfaction of a contemporaneous debt it is held to be an absolute payment if so transferred as to end the transferor's liability thereon, that is, without indorsement. (*Crane v. McDonald*, 45 Barb., 355; *Boyd v. Hitchcock*, 20 Johns., 76.)

A new bill or note given in renewal of an old one retained by the payee, is also held to constitute but a suspension of the old one until the new one is paid. If the new note fails for any reason, the old one is revived and suit may be brought on it. (*Ritter v. Singmaster*, 73 Pa. St., 400.) To rebut this legal presumption that such payments are conditional, there must be an express agreement to the contrary, or such circumstances as will by implication show that the parties considered the payment absolute. Thus while a receipt in full signed by the

recipient of the paper is not considered sufficient to rebut the presumption of conditional payment, if other corroborating circumstances appear, as where the words were, "received and accepted in full satisfaction," and security by the indorsement of a third person was given, it was held to be an absolute payment. (*Morris v. Harvey*, 75 Va., 726.) Some cases hold where the holder had the option of a cash payment or the bill it will be treated as an absolute payment, but the surrender of a security is not sufficient to alter the presumption. (*Tiedeman, Com. Pap.*, Sec. 380.)

The conditional payment operates to suspend the right of action on the original paper until the paper taken in payment falls due, then the holder can sue, at his election, on either of the obligations. But if he sues on the original debt or note, he must present and surrender the bill or note taken in payment, or account for it to the satisfaction of the party giving it. It is the duty of a holder of a bill taken in conditional payment to present it for acceptance or payment and do all things necessary to charge the parties liable on it, and a failure so to do, is held by some authorities to discharge the debtor both on his indorsement and on the original debt. (*Mauney v. Coit*, 80 N. C., 300.) While others hold such failure will only discharge the debtor in case he has been damaged by the negligence of the creditor. (*Kephart v. Butcher*, 17 Ia., 240; *Tiedeman, Com. Pap.*, Sec. 382.)

CHAPTER VII.

LIABILITIES OF PARTIES AND SPECIAL FORMS OF DISCHARGES.

Sec. 834. **LIABILITY AS BETWEEN DRAWEE AND DRAWER OR HOLDER.**—We have seen (Ante, Chapter V) that the drawee does not become an actual party to the bill until he has accepted, and that he is not bound to accept, unless, upon a valuable consideration, he has expressly or impliedly agreed to do so. The drawee for the breach of an agreement to accept with the drawer would be responsible for the damages resulting, and these include damages to drawer's credit. (*Roberts v. Corbin*, 26 Ia., 315.)

So as regards the holder the drawee before acceptance incurs no liability to the holder, and no privity of contract exists between them. So the holder of a check dishonored by the bank on which it was drawn would have no redress as against the bank though the drawer had money in bank to pay it. (*Carr v. Natl. Bank*, 107 Mass., 45; *Griffin v. Kemp*, 46 Ind., 175; *Bank v. Bank*, 80 Ill., 212.) Privity between drawee and a holder may be created by an agreement outside of the bill, and the liability of the drawee might become that of an acceptor under such an agreement. (*Re-Agra Bank*, 2 L. R. Ch., 391.)

Sec. 835. LIABILITY OF ACCEPTOR TO HOLDER.—By acceptance of a bill the drawee becomes the principal debtor, and in effect agrees that he will pay it at maturity according to the terms of his acceptance. (Philpot v. Bryant, 4 Bing., 720; Rowe v. Young, 2 Bligh. H. L., 467.) To a *bona fide* holder the acceptance of a bill of exchange precludes the acceptor from denying the existence of the drawer; the genuineness of his signature, or his capacity and authority to draw the bill. (N. Park Bank v. North Bank, 46 N. Y., 77.) But this rule is further restricted by the authorities so that the holder in addition to being a holder in good faith, must not have contributed through neglect or otherwise in misleading the acceptor into believing the signature of the drawer to be genuine.*

By accepting a bill payable to drawer's order, the acceptor warrants that the drawer is at the time not incapacitated from indorsing, but does not warrant the genuineness of the signature or the authority to indorse.**

Acceptance of a bill payable to a third person precludes the acceptor from denying the existence of the payee, and his capacity to indorse at the

*White v. Cont. Bank, 64 N. Y., 316; Peoria R. R. Co., v. Neill, 16 Ill., 269. And by McKleroy v. Bank, 14 La. An., 462, it is held that the genuineness of the signature is only warranted by the acceptor to a holder who takes the bill after the acceptance.

**Braithwaite v. Gardiner, 8 Q. B., 473; Canal Bank v. Bank, 1 Hill, 287; Garland v. Jacomb, 8 L. R. Ex., 216. In the latter case a bill drawn and indorsed by a partner in non-trading firm was not warranted by the acceptance.

time, but not the genuineness of the indorsement. (Benj.'s Chalmers, B. N. & C., Art. 212.) Where there is a forged indorsement on the bill when issued by the drawer, it could not be set up as against a *bona fide* holder, as the drawer is responsible for the utterance of the forgery, and can be charged with the bill by the acceptor. (Horstman v. Henshaw, 11 How., 177.)

By refusing to pay the accepted bill at maturity the acceptor becomes liable for the amount of the bill with interest from the date of maturity when the bill is payable on a day certain, or with interest from the date of presentment for payment when payable on demand. (Ayer v. Tilden, 15 Mass., 183; Patrick v. Clay, 4 Bibb., Ky., 246.) And as special damages the acceptor is liable for the expenses of protest, and cost of re-exchange to the party taking up the bill. (Bowen v. Stoddard, 10 Met., 375.)

Sec. 836. LIABILITY OF DRAWER OR INDORSER TO THE HOLDER.—“The drawer of a bill of exchange engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be not so accepted and paid he will indemnify the holder, provided due notice of dishonor be given.” (Benj.'s Chalmers, B. N. & C., Art. 215.) And by drawing the bill the drawer warrants and admits to a *bona fide* holder the existence of the payee and his *then* capacity to indorse. (Id., Art. 216.)

All persons who sign a negotiable instrument except as a drawer or acceptor, or by way of receipt, incur thereby the liability of indorsers. (*Bigelow v. Colton*, 13 Gray, 309; *Ex. part Yates*, 3 D. & J., 191.)*

Indorsers, as regards their liability are deemed new drawers. Each indorser, by his indorsement, contracts that the bill will be paid according to its tenor on presentment, and in case it is not accepted and paid he will indemnify the holder upon receiving due notice of dishonor. (*1st Natl. Bank v. Marine Bank*, 20 Minn., 63.) Each indorser upon indorsement warrants and admits to innocent holders the genuineness and regularity of the drawer's signature, and of all previous indorsements; that the bill is a valid and subsisting one, and that his title to it is lawful. (*Williams v. Inst.* 57 Miss., 633; *Watson v. Cheshire*, 18 Ia., 202.)

As regards an innocent holder the indorser could not set up as a defense to his liability that the drawer's or acceptor's signature had been forged, or that the bill had been materially altered after issue and

*A person indorsing a bill or note in blank of which he is not the holder or payee, is called a quasi-indorser, and by some authorities is held to incur the liability of an indorser, subject to the true intention of the parties, which, when ascertained controls his liability. And by other authorities he is held liable as a joint promisor or co-maker in case he indorsed the note before issue, and as a guarantor if the indorsement was made after its issue, subject, of course to the true intention of the parties. For the first rule, see: *Browning v. Merritt*, 61 Ind., 425; *Eilbert v. Finkbeiner*, 68 Pa. St., 243. And for the second rule see: *Union Bank v. Willis*, 8 Met., 504; *Good v. Martin*, 95 U. S., 90; *Herbage v. McEntee*, 40 Mich., 337; *Chafee v. R. R.*, 64 Mo., 193.

before indorsement, since his indorsement operates as a new and independent contract. (*Andrews v. Simms*, 33 Ark., 771; *Dalrymple v. Hillenbrand*, 62 N. Y., 5.)

The indorser upon the dishonor of the bill becomes liable to the holder for the amount of the bill with interest from the date of dishonor, in the case of an inland bill, but interest in the way of damages may or may not be given as the facts of the particular case would warrant. (*Keene v. Keene*, 3 C. B., N. S., 144.) And upon a foreign bill of exchange, the indorser becomes liable for the face of the bill with interest from the date of dishonor, plus protest fees, re-exchange, interest and expenses.

Sec. 837. SAME SUBJECT—EXCHANGE AND RE-EXCHANGE DISCUSSED.—Exchange means the cost of transmitting money from one place to another. But as in commercial transactions the bills drawn upon one place are offset by those the place of payment may have upon the town or city drawing, the rate or cost of exchange varies as between two places as the inequality between bills drawn and bills payable increases. In the place of the greater liabilities exchange will be higher or at a premium, and in the other place at a discount. In the case of a bill drawn payable in a foreign country the drawer, and likewise an indorser, agrees that the holder shall receive the full face value of the bill in the place of payment, it has become the rule of the law merchant that the holder, upon dishonor of the

bill, from the place of payment may draw a new bill on the indorser or original drawer for such a sum as will be worth in the indorser's or drawer's domicile, the face value of the original bill in its place of payment. This second bill is called a bill of re-exchange, and the cost of such exchange is assessable by way of damages against the drawer or indorser of the dishonored bill. (*Bank of U. S. v. United States*, 2 How., 737.)*

While such a bill of re-exchange is not actually drawn it serves to ascertain the amount of damages to be collected by the holder. And now by statute in most of the States and countries this damage by way of cost of exchange is fixed at a definite amount to be recovered as liquidated damages. (Tiedeman, Com Pap., Sec. 406.) In case of a conflict of laws, the liability of the drawer or indorser is fixed by the law of the place where the bill is drawn or indorsed, and not by the place of payment. (*Crawford v. Bank*, 6 Ala., 12; *Gibbs v. Fremont*, 9 Exch., 25.)

Promissory notes are not within the commercial rule as to re-exchange unless written "with exchange," or until indorsed, when it becomes a

*"Re-exchange" means the loss resulting from the dishonor of a bill of exchange in a country different from that in which it was drawn or indorsed. The re-exchange is ascertained by proof of the sum for which a sight bill (drawn at the time and place of dishonor at the then rate of exchange on the place where the drawer or indorser sought to be charged resides must be drawn in order to realize at the place of dishonor the amount of the dishonored bill and the expenses consequent on its dishonor." (*Benj.'s Chalmers, B. N. and Checks, Art. 221.*)

sort of bill of exchange upon the maker, and the holder may recover principal, interest, costs, and exchange. (*Bank of Mo. v. Wright*, 10 Mo., 719; *Cash v. Kennion*, 10 Ves., 314; contra, *Adams v. Cordis*, 8 Pick., 260.)

Sec. 838. SAME SUBJECT—INTEREST.—Many statutes fix a legal rate of interest and allow a greater rate by express contract. Where this is the case and the higher rate is specified in the bill, it is in dispute whether this rate of interest can be recovered after maturity. The weight of authority seems to be that the specified rate can be recovered after maturity, though this is denied in many cases * Where the United States courts have to pass upon this question of interest, the legal interest alone can be recovered except where the case comes up from one of the States where the other rule prevails. (*Holden v. Trust Co.*, 100 U. S., 72.)

Sec. 839. LIABILITY OF PERSON WHO TRANSFERS BY DELIVERY ONLY.—A bill made payable to bearer is transferrable by delivery only, and a party thus transferring, called a transferor by delivery, incurs no liability on the instrument, and unless given as collateral security or for an antecedent debt he is not liable for the considera-

**Hand v. Armstrong*, 18 Ia., 324; *Pruyne v. Milwaukee*, 18 Wis., 568; *Hopkins v. Crittenden*, 10 Tex., 189; *Seymour v. Continental Life Ins. Co.*, 44 Conn., 300, hold that the specified rate can be recovered, while the following cases hold the contrary: *Duran v. Ayer*, 67 Me., 145; *Newton v. Kennerly*, 31 Ark., 626; *Perry v. Taylor*, 1 Utah, 63.

tion for which the bill was transferred in case of its dishonor. (*Munroe v. Hoff*, 5 Den., 360; *Van Wart v. Wolley*, 3 B. & C., 446.) A transfer or by delivery, however, warrants to his immediate transferee that the bill is what it purports to be (*Challis v. McCrum*, 22 Kans., 157), and that at the time of transfer he is without notice of any fact which destroys its validity. (*Delaware Bank v. Jervis*, 20 N. Y., 228.) The transferee upon discovering a defect in the bill known to the transferor, must give notice of his intention to repudiate the transfer with reasonable diligence. (*Benj.'s Chalmers*, B. N. & C., Art. 226.) Also, by the weight of authority, the transferor warrants the solvency of the maker at the time of the transfer. (*Roberts v. Fisher*, 43 N. Y., 159; *Townsend v. Bank*, 7 Wis., 185; contra, *Bicknall v. Waterman*, 5 R. I., 43.)

Sec. 840. **LIABILITY OF PERSON ACCOMMODATED TO ACCOMMODATION PARTY.**—An accommodation party is defined in *Benj.'s Chalmers*, as “a person who has signed a bill as drawer, indorser, or acceptor, without receiving value, and for the purpose of lending his name to some other person as a means of credit.” (Art. 90.) To such a party to a bill the person accommodated, or the principal creditor on the bill, engages that he will see to the payment of the bill at maturity, and in case of failure so to do, that he will indemnify the accommodation party. If the accommodation party is compelled to pay the bill, he has the rights of the

ordinary surety, and entitled to the benefit of any security held by the creditor. If there are two or more accommodation parties, they are considered as co-sureties as between themselves. (Baker v. Martin, 3 Barb., 634; Reynolds v. Wheeler, 30 L. J., C. P., 350.)

Sec. 841. WHAT WILL OPERATE TO DISCHARGE THE LIABILITY OF PARTIES TO A BILL OR NOTE.—By discharge of a bill is meant the extinguishment of rights of action on it. It then ceases to be negotiable, and its transfer can only operate as a new contract between the transferor and transferee. (Eaton v. McKown, 34 Me., 510.) The law governing the question of discharge is that of the place where the party sought to be charged became a party to the instrument. Thus where a bill was drawn and issued in the United States on a party in England and dishonored, it was held that the drawer could not be sued in England because he had been discharged in America as a bankrupt. (Potter v. Brown, 5 East, 124.)

A bill is discharged by payment in due course (Ante, Secs. 829-832); by part payment in due course the bill will be discharged *pro tanto* (Com. Bank v. Cunningham, 20 Pick., 275); by the acceptor becoming the holder after maturity in his own right (Hall v. Kimball, 77 Ill., 161; Mitchell v. Rice, 6 J. J. Marsh, 625); by the holder renouncing absolutely and unconditionally after maturity his rights against the acceptor (Larkin v. Hardenbrook, 90 N. Y.,

333). So where the holder intentionally strikes out or cancels a signature of a party, such party is thereby discharged. (Brett v. Marston, 45 Me., 401.)

Sec. 842. SAME SUBJECT—WHEN SURETY DISCHARGED.—The holder of a bill having notice that the relationship of principal and surety exists between prior parties to the instrument, will discharge such sureties by giving time to the principal unless he expressly reserves his rights against the sureties.*

Sec. 843. SAME SUBJECT—FORGERY AND ALTERATIONS AS A DISCHARGE.—By forgery is meant the counterfeit making or fraudulent alteration of any writing, and may consist in the signing of another's name, or the alteration of an instrument in the name, amount, description of the person, and the like, with intent thereby to defraud. The intent to defraud distinguishes forgery from innocent alterations and spoliation. A forgery or fraudulent alteration will avoid the instrument and

*Benj.'s Chalmers, B. N. and Checks, Art. 245. "*Prima facie* the acceptor of a bill is the principal debtor, and the drawer and indorsers are as regards him, sureties, and the drawer of a bill is the principal as regards the indorsers and the first indorser is the principal as regards the second and subsequent indorsers, and so on in order; but evidence for the present purpose is admissible to show the real relationship of the parties, and it is immaterial that the holder was ignorant of the real relationship when he took the bill, provided he had notice thereof at the time of his dealings with the principal." Id. (And see the subsequent part of this book on Guarantors and Sureties.)

also extinguish the debt which represents the consideration of the instrument. (Tiedeman, Com. Pap., Sec. 392.) An innocent alteration, when material, is also held by some authorities to avoid the instrument while not canceling the debt, others holding that so long as the alteration has caused no injury a court of equity may restore it to its original condition so that a suit may be brought on it. (Booth v. Powers, 56 N. Y., 31; Kountz v. Kennedy, 63 Pa. St., 187; contra, Bigelow v. Stephens, 35 Vt., 525.)

When the change in the bill or note is made by a stranger it is called a spoliation instead of an alteration. Such a change of an instrument has no effect upon it, if the original meaning can be ascertained. (Buckler v. Huff, 53 Ind., 474; Laugenberger v. Kroeger, 48 Cal., 147.)

A material alteration is defined to be any change in the instrument which affects or changes the liability of the parties in any way. The alteration avoids the paper regardless whether it is favorable or unfavorable to the party making the alteration. (Franklin Ins. Co. v. Courtney, 60 Ind., 134.) The following have been held to be material alterations: Any change in the date of the instrument, but not in the date of indorsement (Wood v. Steele, 6 Wall., 80; Griffith v. Cox, 1 Tenn., 210); any alteration in the amount of principal or interest (Harsh v. Klepper, 28 O. St., 200; Draper v. Wood, 112 Mass., 315); any change in the character of the payment, whether in the denomination or the medium of pay-

ment (*Schwalm v. McIntyre*, 17 Wis., 232; *Darwin v. Rippey*, 63 N. C., 318); any alteration in the personality, number and relations of the parties (*Lamb v. Paine*, 46 Iowa, 551); any change in the liability of the parties (*Blake v. Colman*, 22 Wis., 415); or any change in the place of payment (*Tiedeman, Com. Pap.*, Sec. 394; *Benj.'s Chalmers*, B. N. & C., Art. 247).

The effect of a material alteration by the holder of a bill is to discharge all parties from liability on the bill, unless they consented to such alteration. (*Willis v. Wilson*, 3 Ore., 308; *Bank v. Lockwood*, 13 W. Va., 392.)

Immaterial alterations which are those which do not change the legal effect of the instrument, as adding words implied by law, making marginal figures correspond to the written statement in the body of the instrument, the adding of immaterial memoranda, and the like. (*Smith v. Smith*, 1 R. I., 398; *Bachelor v. Priest*, 12 Pick., 399) So the correcting of a mistake to conform to the intention of the parties is an immaterial alteration. (*Bank v. Bank*, 13 N. Y., 309.)

The holder of a bill altered materially cannot recover on the original consideration, unless the alteration was made before he received it and he had no notice of the fact; or unless he was innocent of fraud in making the alteration, and the party sued would not have had any remedy over or recourse to others, if it had not been altered. (*Benj.'s Chalmers*, B. N. & C., Art. 249.)

Bona fide holders are only protected against forgery or material alterations discharging the party liable, when some carelessness or negligence on the part of the person whose liability has been changed by the alteration, has contributed to the negotiation of the paper without suspicion of the fraud, as where blank spaces have been left, or written partly in pencil so as to be easily erased. (Zimmerman v. Rote, 75 Pa. St., 188; Harvey v. Smith, 55 Ill., 224.) So a memorandum which can be detached without affecting the paper will, when detached in fraud, not be allowed to avoid the paper in the hands of a *bona fide* holder. (Noll v. Smith, 64 Ind., 511.)

It must not be forgotten in this connection, that the drawee, by accepting a bill, warrants the genuineness of the drawer's signature, and the indorsers likewise guarantee the genuineness of all parties to the bill at the time of the indorsement. As against such parties the alteration or forgery of a signature prior to their signature will not avoid the instrument. (See Ante, Secs. 834-837.)

Sec. 844. TIME WITHIN WHICH SUIT MAY BE BROUGHT ON A BILL.—At the common law the limitation within which an action may be brought on a bill or note is six years, and after the expiration of this time the holder who has had a right of action for this period against any party cannot sue such party. (Woodruff v. Moore, 8 Barb., 171.) The period or limitation varies in the

different States, and in some the common law term has been lengthened, in Ohio it is fifteen years. (Rev. Stat. Ohio, Sec. 4980.)

The time begins to run as regards the acceptor from the maturity of the bill, except where presentment for payment is necessary, in which case time runs from the date of such presentment, and where the acceptance is made after maturity the time probably runs from date of acceptance. (Benj.'s Chalmers, B. N. & C., Art. 252.) Notice of dishonor fixes the date when the time begins to run as regards the drawer and indorsers. (Wood v. McMeans, 23 Tex , 481.)

Any circumstance which delays or defeats the operation of the statute of limitations in the case of an ordinary contract will delay or defeat it in the case of a bill. Thus if the holder is a minor, married woman, a lunatic, or otherwise protected from the running of time, the statute will not begin to operate until the disability is removed. So the bill when barred from the operation of the statute of limitation may be subsequently rendered valid by an acknowledgment in writing by the party sought to be charged.

CHAPTER VIII.

PROMISSORY NOTES AND CHECKS SPECIALLY CONSIDERED.*

Sec. 845. FORM AND INTERPRETATION OF A PROMISSORY NOTE.—In a previous section (Ante, Sec. 752) a promissory note has been defined and somewhat explained, and we only need to state here some special provision applicable to promissory notes. The person making the promise is called the maker of the note, and the person in whose favor it is made is called the payee. These two parties are essential to every note, and a note payable to maker's order would not be a note until a payee had been designated by indorsement. (Miller v. Weeks, 22 Pa. St., 89.) The note is incomplete until delivery has been made to the payee.

As regards the form of a promissory note, any writing which has all the essentials laid down for a promissory note will be a valid note if the intention of the maker, as gleaned from the writing, was to make a note. (Sibree v. Trip, 15 M. & W., 29.) The following have been held not to be notes but mere evidences of indebtedness: "Due C \$100, value received;" "I. O. U. \$100;" "I acknowledge

*The preceding chapters have discussed principles applicable alike to bills of exchange, promissory notes and checks, and when not otherwise limited the expression "bill" heretofore used referred to all of these negotiable instruments.

the within note to be just and due," written on the back of a note. (*Daggett v. Daggett*, 124 Mass., 149; *Currier v. Lockwood*, 40 Conn., 349.) While the following are held to be notes since importing a promise to pay: "I owe you \$100, to be paid May 5th;" "Due C or order \$100 on demand." (*Waithman v. Elsee*, 1 C. & K., 35; *Carver v. Hayes*. 47 Me., 257.)

There may be two or more makers to a promissory note, and in case it is written "I promise," it will be considered joint and several if they are not partners. (*Maiden v. Webster*, 30 Ind., 317.) If written "We promise," and signed by several it is considered a joint note only. (*Barnett v. Juday*, 38 Ind., 86.) But these holdings are subject to statutory modifications.

The note may contain a pledge of collateral security, and give the payee the right to dispose of such security, and the right to the security passes with a transfer of the note, and free from equities if the note was free. (*Knipper v. Chase*, 7 Ia., 145; *Duncan v. Louisville*, 13 Bush, 378; *Kelley v. Whitney*, 45 Wis., 110.)

So an instrument is still a note which gives the holder an option of taking a cash sum, or the performance of another act from the maker. Thus where the note promised to pay a sum certain in money or in goods on demand, it was held a valid note in the hands of the payee, as he could demand money, and the promise to pay money was absolute notwithstanding the option. (*Hosstatter v. Wilson*,

36 Barb., 307.) But as to the maker, it is held not to be a note. (*Dinsmore v. Duncan*, 57 N. Y., 573.)

Sec. 846. THE TRANSFER OF PROMISSORY NOTES.—Promissory notes have been made negotiable the same as bills of exchange by statute, though many decisions hold that they are negotiable independent of statute

Like bills of exchange, a promissory note, payable on demand and not known to be dishonored, will be deemed overdue after the lapse of a reasonable time from the date of its issue. Reasonable time is a question of law, but governed in the absence of statute, by the circumstances of the case and the intention of the parties. (*Herrick v. Wolverton*, 41 N. Y., 581; *Poorman v. Mills*, 39 Cal., 345.) And such a note must be presented for payment within a reasonable time in order to charge indorsers. (*Crim v. Starkweather*, 88 N. Y., 339.)

Sec 847. LIABILITY OF MAKER OF A NOTE.—The maker of a promissory note, in general corresponds to the acceptor of a bill of exchange, each being the principal debtor on the bill, and each engages that he will pay at maturity according to the tenor of the bill. And the maker of a note payable to order, warrants and admits to a *bona fide* holder the existence of the payee, and his then capacity to indorse. (*Esley v. People*, 23 Kans., 510; *Benj.'s Chalmers*, B. N. & C., Art. 287.)

CHECKS.

Sec. 848. A CHECK DEFINED AND DISCUSSED.—Professor Tiedeman defines a check “to be a draft or order, having essentially the characteristics of a bill of exchange, and differing from the bill (1) in being drawn on a bank or banker, (2) apparently and presumptively against a deposit of funds, and (3) payable on demand without grace.”*

Contrary to the English rule, in the United States banks are required as a matter of custom to pay checks drawn “to order,” and must at their peril pay to the exact party mentioned in the order. (*Dodge v. Natl. Exch. Bank*, 30 Ohio St., 8.) Unless the order is drawn on a bank or banker it will not be a check, though it may be a bill. (*Espy v. Bank of Cin.*, 14 Wall., 620.) To constitute a check the order should be drawn against funds in the hands of

*Com. Paper, Sec. 430. See other definitions, Ante, Sec. 754. “Bank checks are not inland bills of exchange, but have many of the properties of such commercial paper, and many of the rules of the law merchant are alike applicable to both. Each is for a specific sum, payable in money. In both cases there is a drawer, drawee, and payee. Without acceptance no action can be maintained by the holder upon either, against the drawee. The chief points of difference are, that a check is always drawn on a bank or banker. No days of grace are allowed. The drawer is not discharged by the laches of the holder in presentment for payment, unless he can show that he has sustained some injury by the default. It is not due until payment is demanded, and the statute of limitations runs only from that time. It is by its face the appropriation of so much money of the drawer in the hands of the drawee to the payment of an admitted liability to the drawer. It is not necessary that the drawer of a bill should have funds in the hands of the drawee. A check in such cases would be a fraud.” (*Merchants’ Bank v. State*, 10 Wall., 647.)

the drawee bank, and if there are no funds on deposit and no arrangement made for meeting the check it will still be considered a check if apparently drawn against a deposit. (*Champion v. Gordon*, 70 Pa. St., 476.) By some authorities it is deemed a bill of exchange. (*Planter's Bank v. Keese*, 7 Heisk., 200) And the order to the banker must be payable on demand if it is to constitute a check, since it is supposed to be drawn against a deposit and there is no need of acceptance or days of grace. (*Georgia Natl. Bank v. Henderson*, 46 Ga., 496; *Andrew v. Blackley*, 11 Ohio St., 89.) A few authorities hold that an instrument may be a check, when having the other requisites, though payable a stated number of days after date or sight. (*Bank v. Wheaton*, 4 R. I., 30.)

The usual form of a check has already been given (*Ante*, Sec. 754), but it need not be written with all the exactness of the form given to constitute a valid check. Thus the date may be omitted, or the check may be ante-dated or post-dated and is still valid. A post-dated check may be issued, but is not payable before the given date. The purpose of post-dating checks is to give the debtor time to make payment. The usual form of a check has the name of the bank written across the top in large letters as in the form given, but when drawn on a banker or banking firm and not on a chartered bank, the address is customarily put in the left-hand corner as in bills of exchange. (*Tiedeman*, Com. Pap., Sec. 435.)

Sec. 849. CERTIFIED CHECKS DISCUSSED.

—A check is not intended for circulation or for acceptance, but for prompt payment on presentment. In the United States a custom has come to prevail whereby the bank named as drawee accepts or certifies to the holder that the check will be paid on presentment.*

By the certification of the check the bank becomes the principal debtor, even as the acceptor of a bill of exchange. (Bank v. Leach, 52 N. Y., 350.) It precludes the bank from setting up a forged signature in the check or the lack of funds of the drawer. The amount of the certified check is in effect transferred from the depositor to the holder, and it cannot be countermanded or controlled in any way by the drawer. (Gerard Bank v. Bank of Penn. Twp., 39 Pa. St., 92.) A forgery in the body of the check is a defense even as against a *bona fide* holder, as the bank only warrants the genuineness of the drawer's signature. (Bank v. Bank, 67 N. Y., 458; Clews v. Bank, 89 N. Y., 418; contra, La. Bank v. Bank, 28 La. An., 189.)

*"The practice of certifying checks has grown out of the business needs of the country. They enable the holder to keep or convey the amount with safety. They enable persons not well acquainted to deal promptly with each other, and they avoid the delay and risks of receiving, counting, and passing from hand to hand, large sums of money. It is computed by a competent authority that the average daily amount of such checks in use in the city of New York is not less than one hundred millions of dollars. We could hardly inflict a severer blow upon the commerce and business of the country than by throwing a doubt on their validity." (Swayne, J. in Merchants' Bank v. State Bank, 10 Wall., 648.)

A certified check circulates as cash, since it is an absolute indebtedness of the bank, and recovery thereon is only stopped by the statute of limitations. (*Willetts v. Bank*, 2 Duer, 121.)

The usual mode of certifying a check is for the proper officer of the bank to write across the face of the check the word "good" and add his name or initials, though either alone may constitute a good certification. (*Morse on Banking*, 284; *Barnett v. Smith*, 30 N. H., 256.) A verbal statement to the holder as an inducement to take the check, by the bank officer, will operate as a certification, unless the bank had no funds of the drawer at the time, when, to satisfy the statute of frauds, as regards a promise to answer for the debt of another, the promise would have to be in writing. (*Tiedeman, Com. Pap.*, Sec. 437.)

The proper officer of the bank to certify checks is determined by the by-laws of the institution, or by implication from the duties of the officer. The board of directors have the power, and may delegate it to other officers. The president, cashier and teller, but not an assistant cashier, have implied power. (*Bank v. Bank*, 14 N. Y., 624; *Pope v. Bank of Albion*, 57 N. Y., 127.) But such officer cannot bind the bank by certifying his own check, and such a certificate is void in the hands of an innocent holder if it appears on the face of the paper, or the holder had notice of the fact. (*Claflin v. Farmers' Bank*, 25 N. Y., 294.) The officer cannot bind the bank by certifying a check for a drawer

not in funds except to a *bona fide* holder without notice of the fact. And the bank will not be bound by the certification of a post-dated check prior to the given date. (Tiedeman, Com. Pap., Sec. 439; Clarke Natl. Bank v. Bank of Albion, 52 Barb., 593.)

Sec. 850. NEGOTIABILITY OF CHECKS.—Checks are negotiable instruments, and as such are transferred by indorsement or delivery as bills of exchange. A bank may require the holder of a check payable to bearer to indorse his name on it for the double purpose of a receipt and a memorandum of the person receiving payment. Such an indorser is not bound unless it can be shown that he signed with the intention of becoming a regular indorser. (Daniel, Sec. 1653; Tiedeman, Com. Pap., Sec. 440)

Sec. 851. PRESENTMENT FOR PAYMENT, AND PROTEST OF CHECKS.—As regards the liability of indorsers, presentment for payment, notice of dishonor and protest, are duties to be performed by the holder of a check, with equal or greater precision and dispatch than in the case of other commercial paper. Protest of a check must be made to hold drawer or indorsers the same as in case of bills and notes. (Norris v. Despard, 38 Md., 491.)

As regards the drawer, the presentment for payment, and notice of dishonor if not made or given within a reasonable time by the holder as would be

necessary in the case of a bill of exchange, will not discharge the drawer unless he has suffered actual damage through the delay. This damage is usually caused by the failure of the bank before the check is presented for payment. (*Stewart v. Smith*, 17 Ohio St., 85; *Stevens v. Park*, 73 Ill., 387.) The indorsers would be discharged on account of the laches in making presentment or giving notice irrespective of damage. (*Murray v. Judah*, 6 Cow., 490.)

Sec. 852. SAME SUBJECT—TIME WITHIN WHICH CHECK MUST BE PRESENTED FOR PAYMENT.—A check is deemed to be presented within a reasonable time and with sufficient promptness to charge prior parties when presented according to the following:

1. Where the payee and the bank on which the check is drawn are in the same place, the check must, unless excused by special circumstances, be presented on the next day after it is received.

2. When the person who receives the check and the bank on whom it is drawn are in different places, the check must, in the absence of special circumstances, be forwarded for presentment on the day after it is received, and the agent to whom it is forwarded must, in like manner, present or forward it on the day after he receives it.* Non-business

*Benj.'s *Chalmers, B. N. and Checks*, Art. 257; *Cox v. Boone*, 8 W. Va., 500; *Morrison v. Bailey*, 5 O. St., 13; *Himmelman v. Hataling*, 40 Cal., 111; *Smith v. Jones*, 20 Wend., 192.

days are excluded in computing time under the above rules

The above rules are subject to the preceding section as to the necessity of actual damage suffered by the drawer before he will be discharged by an unreasonable delay in presentment.

The excuses for delay in presenting a check for payment or giving notice of dishonor are the same as those discussed heretofore under Chapter VI. One of the most common excuses being that the check has been drawn against a bank not having funds of drawer, and in such case it is unnecessary to give notice of dishonor to the drawer. (*Fletcher v. Pierson*, 69 Ind., 281; *Kinyon v. Stanton*, 44 Wis., 569.) And the same is true if payment has been countermanded. (*Woodin v. Frayzer*, 38 N. Y., S. C., 190.)

Sec. 853. SAME SUBJECT—WHEN CHECK IS DEEMED OVERDUE AND CHARGES HOLDER WITH THE EQUITIES.—There is some uncertainty among the authorities as to when a check not known to have been dishonored is overdue so as to charge the holder with equities of which he had no notice when taking the note; thus Professor Tiedeman states that a check would be considered stale or overdue "whenever the delay in presentment has been so long that, in the light of the circumstances of the particular case, it is sufficient to arouse the suspicions of a reasonably prudent man." (Com. Pap., Sec. 446.) Thus under

different circumstances a check has been held to be overdue from a delay in presentment of two years (*Skillman v. Titus*, 32 N. J. L., 96); one year, (*Bank v. Woodward*, 18 Pa. St., 357); fourteen months (*Cowing v. Altman*, 71 N. Y., 436); five days (*Down v. Halling*, 4 B. & C., 330). And a delay in presentment for the following periods have been held not to make the check overdue as regards the holder: one month (*Lester v. Given*, 8 Busk, 357); ten days (*Ames v. Merriam*, 98 Mass., 294).

Sec. 854. WHO MAY DRAW CHECKS AGAINST DEPOSITS.—The depositor or his authorized agent should execute the check. A firm deposit may be checked against by any one of the active partners by signing the firm name. A number of persons, not partners, having a deposit to their joint credit, must all unite in drawing checks against it, otherwise if the deposit is to their joint and several credit. (*Morse on Banking*, 266.) This rule is applicable to cases where two or more trustees deposit trust funds, but not to personal representatives, any one of whom may draw against funds of the decedent's estate. (*Allen v. Dundas*, 3 T. R., 125.) A deposit by an individual as a trust fund cannot be held for his private debt to the bank. (*Cent. Natl. Bank v. Ins. Co.*, 104 U. S., 54.)

Sec. 855. WHEN A CHECK MAY BE REVOKED.—Death or bankruptcy of the drawer is held to revoke the authority of a banker to pay a

check. Thus a check given by the drawer in contemplation of death must be presented for payment by the donee before the drawer's death in order to entitle the donee to receive the amount as a gift in contemplation of death. (Benj.'s Chalmers, B. N. & C., Art. 262.) This is the same rule applicable to bills, since there is no consideration for the making of the promise. Where the check is supported by a valuable consideration it is not revoked by the death of the drawer. (Burke v. Bishop, 27 La. An., 465; Tate v. Hilbert, 2 Ves. Jr., 118; Benj.'s Chalmers, B. N. & C., Art. 261.)

Sec. 856. RIGHTS AND DUTIES OF THE BANK OR BANKER.—A banker is bound to honor his depositor's checks (quere, as to his bills), properly presented, to the extent of the funds of the depositor in his hands, and for refusing so to do he becomes liable to such depositor for damages to his credit. (Marzetti v. Williams, 1 B. & Ad., 415.) The bank is entitled to have the funds paid in a reasonable time before they are drawn against, and also to a reasonable time to ascertain what is the state of the account between itself and the depositor. It being allowed the bank to return a check within twenty-four hours after presentment in case a deficiency in the deposit is discovered. (Overman v. Bank, 31 N. J. L., 563.) But this right is denied if the check has been accepted and the money paid out or credited to the checkholder. (Oddie v. Natl. City Bank, 45

N. Y., 735.) A check of a third person presented by a depositor and credited on his bank-book by the bank, is deemed received for collection, and if not paid may be returned, and the credit cancelled. (Natl. Gold Bank v. McDonald, 51 Cal., 65.)

The bank is responsible to the drawer or holder if the check is paid on a forged indorsement, or paid to one not an indorsee or a *bona fide* assignee of the check. (Dodge v. Natl. Exch. B., 30 O. St., 1; Freund v. Imp. & Trad. N. B., 76 N. Y., 352.)

The bank or banker is under no obligation, except by agreement, to allow a depositor to overdraw his account. And in general, if the funds are not sufficient to pay a check in full, part payment need not be made. (Daniel, Sec. 1620.) The bank must pay checks in the order of their presentment so long as the deposit lasts, and should not attempt to pro rate an insufficient fund, or give preference to a holder of a check presented at a later hour than others. (Tiedeman, Com. Pap., Sec. 450.)

The bank may recover the money paid on an altered check from the person to whom it has been paid, since the holder guarantees the genuineness of the contents of the check, and this applies to certified checks. The bank only warranting the genuineness of the signature. (Espy v. Bank of Cinn., 18 Wall., 614; Parker v. Roser, 67 Ind., 500.)

As regards forged signatures of drawer or indorser, the bank is usually held strictly to the obligation to know the signature of its depositor,

and money paid out upon a forged signature of a depositor cannot be recovered back. Others hold that the bank may recover money so paid out where the signature was so cleverly forged as to free the bank from the suspicion of negligence, and the discovery is made and the money demanded back in time to allow the holder to have recourse against other parties. (Daniel, 1655a.) Money paid out on the forged signature of an indorsee or payee may be recovered from the person to whom it is paid, but the bank is liable to the real payee or indorsee. (Seventh Natl. B. V. Cook, 73 Pa. St., 483.)

The holder of the check is quite generally held to have no right of action against the bank for a refusal to pay the check, and for the same reason that the holder of an unaccepted bill of exchange cannot sue the drawee for refusing to accept, that is, because there is no privity between the holder and drawee unless the bill would constitute an assignment *pro tanto* of the fund drawn against, and this is not feasible by another rule of law which denies the right of a creditor to split up a single indebtedness into a number of obligations or rights of actions. A few authorities do hold that a check does operate *pro tanto* as an assignment of the fund, and Professor Tiedeman makes a strong argument that in the case of checks this would be no burden on the banker, since he impliedly agrees to pay out the fund in parts as the depositor elects. (Com. Pap., Sec. 452.) But the weight of authority is against the right of the checkholder to sue the

bank. (Brown v. Leckie, 43 Ill., 500; Roberts v. Austin, 26 Ia., 316.)

The holder of a check on a bank is entitled to receive payment free from any offset by the bank for a debt which such holder may owe the bank. (Brown v. Leckie, *supra*.)

Sec. 857. RIGHTS AND LIABILITIES OF DRAWER OF CHECK.—After presentment for payment and dishonor the check is evidence of the indebtedness of the drawer, the check is presumed to be given in satisfaction of a debt, but may be shown to have constituted a loan from drawer to payee, and is then evidence of the amount. (Tiedeman, Com. Pap., Sec. 455.) When held by the drawer the check is presumptively a receipt for money paid the payee, if it was made payable to order. But when the check is payable to bearer, affirmative evidence would be required to show who received the payment. (Conelly v. McKean, 64 Pa. St., 113; People v. Baker, 20 Wend., 602.) The check is not evidence of payment of a particular account, without proof of the special consideration. (Aubert v. Walsh, 4 Taunt., 293; Tiedeman, Com. Pap., Sec. 455.)

The check when paid becomes the property of the drawer, but may be kept by the bank as a voucher or receipt for money paid out on the account of the depositor until the account is balanced or settled, when they are to be delivered up to the depositor.

Sec. 858. ACCOUNT PAID BY CHECK NOT DISCHARGED UNTIL THE CHECK IS PAID.—It is the invariable rule of law that when a check is given in payment of a debt it does not constitute an absolute discharge of that debt until it is paid. (Smith v. Miller, 43 N. Y., 151; Hearth v. Rhodes, 66 Ill., 351.) And the surrender of a bill or note could not be compelled until the check given in payment had been paid. (Barnett v. Smith, 30 N. H., 256.)

CHAPTER IX.

PAPER MONEY, COUPON BONDS, AND QUASI-NEGOTIABLE PAPER.

Sec. 859. KINDS OF PAPER MONEY, AND EFFECT AS NEGOTIABLE INSTRUMENTS.— A number of different kinds of paper money exist in the United States, some being made by law legal tender and receivable in payment of all debts, while others simply pass as currency on the credit of the bank or fund which they are drawn against. All these species of paper money are negotiable instruments, payable to bearer, and transferred by delivery. They are: United States Treasury Notes, Silver and Gold Certificates, and Bank Notes.

United States Treasury Notes are in form promissory notes payable to bearer on demand. By statute they are made legal tender, and their issue by the United States, though questioned at first, has been upheld by the Supreme Court. (*Juillard v. Greenman*, 110 U. S., 421.) Unlike ordinary promissory notes all kinds of paper money is printed on fine paper of a texture selected to prevent counterfeiting. The silver and gold certificates issued by the federal government are not legal tender, and are payable as the certificate states, in gold or silver coin deposited in the treasury and payable to bearer on demand

Bank-notes or bank-bills are the promissory notes of incorporated banks intended to pass current as money. (Tiedeman, Com. Pap., Sec. 464.) When they are issued and made payable at a future time they are called post-notes, otherwise they are payable to bearer on demand. Bank-notes not being legal tender, they are not a valid tender in payment of a debt if objected to, and this is true as to a debt due to the bank that issued them unless by statute they are made receivable for all debts owing the bank of issue. (Thomas v. Todd, 6 Hill, 340; Bank of U. S. v. Bank of Ga., 10 Wheat., 333; Bank v. Roosevelt, 9 Cow., 409.) Bank-notes and post-notes are negotiable, and since they are designed to circulate rapidly as currency or money, the holder is presumed to be the *bona fide* owner even though guilty of negligence in taking the notes, and can compel payment to him though the notes were stolen from the true owner. (Tiedeman, Com. Pap., Sec. 464; Worcester Co. Bank v. Dorchester Bank, 10 Cush., 488.)

The holder should receive the notes in the usual course of business and not as a pledge or security upon an agreement not to put them in circulation, in order to be deemed a *bona fide* holder. (Davenport v. City Bank, 9 Paige, 12.)

Since bank-notes are specially intended to circulate indefinitely, they are not to be deemed overdue because not presented a reasonable time after issue. And they may be re-issued after payment, unless protested for non-payment, in which case the holder,

with or without notice, would be charged with equities. (2 Parsons, N. & B. 95; Burroughs v. Bank, 70 N. C., 284.)

The transfer is customarily made by delivery only, though a transfer by indorsement may be made. In either case the transferor warrants the genuineness of the note, and in case of its being counterfeit he is the loser, and the debt for which it was transferred is not cancelled. (Young v. Adams, 6 Mass., 182; Ramsdale v. Horton, 3 Pa. St., 330.) The receiver of counterfeit notes must give notice of its character within a reasonable time or he will lose his remedy against the transferor. Reasonable time is governed by the facts of each case. (Simms v. Clark, 11 Ill., 137; Gloucester Bank v. Salem Bank, 17 Mass., 44.) In case the holder of bank-bills or notes loses them the loss falls on him, unless he can show that certain specific notes were destroyed and indemnify the bank against their future presentment for payment. In case of a partial destruction or loss of a note the authorities differ, some holding that a recovery may be had by showing the facts without an indemnifying bond, others requiring a bond. (Bank of U. S., v. Sill, 5 Conn., 112; Commercial Bank v. Benedict, 18 B. Monr., 311; Story on Bills, Sec. 448.)

State bank-notes have been superseded by National bank-notes, and these later notes differ only from the former in that they are secured by the federal government, which guarantees their payment. The government is protected by the deposit

of government bonds by the banks issuing the notes.

COUPON BONDS.

Sec. 860. COUPON BONDS DEFINED AND EXPLAINED.—“A coupon bond is a primary obligation, in the nature of a promissory note, promising to pay a sum of money on a day certain in the future, to which are attached certain other obligations called coupons,* which call for the payment of the installments of interest on the principal debt, as they fall due; each coupon representing an installment of interest, and payable when the installment of interest falls due.” (Tiedeman, Com. Pap., Sec. 471.)

The coupon is practically a separate promissory note, but its payment is protected by the mortgage given to secure the primary bond; it is payable at maturity without grace, and where written in the form of a draft or bill on a banker, it need not be presented for acceptance. (Arents v. Commonwealth, 18 Gratt., 773; Beaver Co v. Armstrong, 44 Pa. St., 63.)

Public corporations, governmental and municipal, and all sorts of private corporations may and do issue coupon bonds. The loans of the Federal and State governments are usually made in this way. (Natl. Bank v. Co. of Yankton, 101 U. S., 133.) Individuals are also held to be able to issue coupon

*Coupon is derived from the French verb, *couper*, to cut, since they are made detachable, and designed to be cut off when they fall due. (Daniel, Sec. 1489.)

bonds, and the only question of this power is from the fact that these bonds are executed under seal, which by the law merchant is excused in the case of corporations but not in the case of individuals. The seal being held to destroy their negotiability. Coupon bonds are negotiable notwithstanding the presence of the seal, if they contain words of negotiability. (Comrs. of Manor v. Clark, 94 U. S., 279; White v. R. R. Co., 21 How., 175; Barrett v. Co. Court, 44 Mo., 197)

The holder or owner of the coupon bond has the same rights and privileges as regards it as he would if it were a bill of exchange, and the same rules operate to fix his position as a *bona fide* holder or not as in the case of other commercial paper. Thus if the coupon is overdue at the time of transfer, the purchaser takes it subject to all equitable defenses. (Bank v. Co. Comrs., 14 Minn., 79; Tiedeman, Com. Pap., Sec. 473.)

Sec. 861. TRANSFER, PRESENTMENT FOR PAYMENT OF COUPON BONDS.—Coupon bonds may be made payable to order and transferred by indorsement, but they are ordinarily payable to bearer and transferred by delivery. (City of Lexington v. Butler, 15 Wall., 295; Roberts v. Bowles, 101 U. S., 122.) A party indorsing a coupon bond assumes the same liability as the indorser of other commercial paper, and both indorser and transferor by delivery warrant the genuineness of the bond, and would be held respon-

sible for the consideration received if the bond was forged. (Smith v. McNair, 19 Kans., 330.)*

For the purpose of fixing the liability of an indorser the coupons must be presented at maturity, and within a reasonable time after maturity to hold a guarantor. (Bonner v. New Orleans, 2 Woods C. C., 135; Arents v. Commonwealth, 18 Gratt., 773.) Otherwise the coupons need not be presented on the day of maturity to hold the principal obligors on the coupons. (Mayor v. Patomac Ins. Co., 58 Tenn., 296.) And interest may be recovered without presentment at maturity, unless the corporation should show that it was ready to pay the coupon at the stipulated place. (Walnut v. Wade, 103 U. S., 683; North Penn. R. R. Co. v. Adams, 54 Pa. St., 97.)

The coupons represent the interest on the bond until maturity, after maturity the bond itself draws interest if not paid. The coupon, if not paid at

*"The bond and coupons are generally printed on paper of a very fine texture, more or less beautifully engraved. But in other respects the bond differs in form very little from a promissory note. It and the coupons are usually signed by the president of the corporation, or the chief executive of the town or municipality, which issues them, and countersigned by the secretary, treasurer, cashier, or other clerk of the corporation, according to its by-laws, or the statutes 'in such cases made and provided.' These signatures may be either written or printed. The coupon may take on any form: sometimes it is a promissory note; at others a bill of exchange on the treasury of the corporation; a draft or order without naming any drawee; a check, and a mere due bill or acknowledgement of indebtedness." (Tiedeman, Com. Paper, Sec. 475., citing, Thompson v. Lee Co., 3 Wall., 327; Moran v. Comrs. of Miami Co., 2 Black, 722; Mercer Co. v. Hubbard, 45 Ill., 140, and others.)

maturity, draws interest, and may be recovered by the holder with exchange, where exchange could be recovered on bills and notes. (Jeffersonville v Patterson, 26 Ind., 16; Tiedeman, Com. Pap., Sec. 477.)

Sec. 862. ACTIONS ON BONDS AND COUPONS, AND DEFENSES ON MUNICIPAL BONDS.—In case the holder is the owner of both bond and coupons he may bring an action in his own name on both bond and coupons. (Soc. for Savings v. City of N. London, 29 Conn., 175.) And the holder of the coupons may maintain his action on them independently of the holder of the bond. (Beaver Co. v. Armstrong, 44 Pa. St., 63; Bank v. Tabor, 52 Vt., 87; Town of Cicero v. Clifford, 53 Ind., 191.) So the coupons may be sued on where the bonds have been previously paid and surrendered. (Natl. Exch. Bank v. Hartford, etc., R. R. Co., 8 R. I., 373.)

Where the corporation denies its liability on bonds, the consideration paid for them by the holder may be recovered, if such holder did not participate in the wrongful issue, and the issuing was not a *malum in se*. (Draper v. Springport, 104 U. S., 501; Louisiana v. Wood, 102 U. S., 294.)

Since a municipal corporation in its issue of coupon bonds is limited by its charter and implied powers, and may not in any case issue them for a private end, but only for a public purpose, the holder of municipal obligations or coupon bonds must take

notice that they are not issued *ultra vires*, that is, outside the power of the municipality. The scope of its powers is deemed a matter of public law, and every one is charged with notice of the limitations set. (Bissell v. Kankakee, 64 Ill., 249; Veeder v. Lima, 19 Wis., 298.) Where the municipality has the power to issue the bonds, the fraud or neglect of agents as to their negotiation or execution with prescribed formalities cannot be set up as a defense to the action of a *bona fide* holder. (Treadwell v. Commissioners, 11 Ohio St., 183; Gould v. Sterling, 23 N. Y., 463.)

Sec. 863. CERTIFICATES OF DEPOSIT AS NEGOTIABLE INSTRUMENTS.—By a certificate of deposit is meant the receipt in writing given by a bank or banker in acknowledgment of money received, and which states that the amount designated therein is payable to bearer, to the order of the depositor, or a third person. The power of a bank to issue them is co-extensive with the power to issue promissory notes.*

Certificates of deposit are transferred by delivery or by indorsement according as they are in terms

*Morse on Banking, 53. "They are used, instead of drawing checks on the fund deposited, whenever the depositor desires a continuing security, drawing interest, and payable on demand or at some time in the future. The certificate of deposit is supposed to have originated with the goldsmiths of England, who, in the course of their banking business, were in the habit of giving to the depositors receipts for the money deposited, in the form of a promissory note." Tiedeman, Com. Paper., Sec. 485.)

payable to bearer or to order. By the weight of authority they are, when possessing the essential features of a negotiable instrument, accorded all the privileges and characteristics which pertain to other forms of commercial paper. (Lynch v. Goldsmith, 64 Ga., 42; Lafayette Bank v. Ringel, 51 Ind., 393; Howe v. Hartness, 11 O. St., 449; Tripp v. Curtenius, 36 Mich., 494; contra, London Sav. Soc. v. Savings Bank, 36 Pa. St., 498; Patterson v. Poindexter, 6 Watts & Serg., 227.) As a negotiable instrument it must be taken before maturity if the holder is to be free from equitable defenses. Likewise it must not be overdue when transferred or the holder will be charged with equities. Demand and refusal are necessary to make the certificate over due when payable on demand. (Pardee v. Fish, 60 N. Y., 271.) The certificate of deposit when given in payment of a debt is presumed a conditional payment unless the creditor transfers the certificate in payment of his own debts instead of presenting it for prompt payment. (Bower v. Hoffman, 23 Md., 264; Lindsey v. McClellan, 18 Wis., 481.)

Sec. 864. **BILLS OF LADING AS NEGOTIABLE INSTRUMENTS.**—"A bill of lading is very often called a negotiable instrument. But, although it does possess some of the qualities of negotiability, it is not strictly one independently of statute, and is more properly described as *quasi-negotiable*."*

*Tiedeman, Com. Paper, Sec. 491. "The bill of lading may be defined to be a written acknowledgement by a common

While a bill of lading as a negotiable instrument is regulated in some States by statute, and given the same characteristics as other commercial paper, it has certain *quasi* negotiable characteristics at common law. Thus while the transferee does not get any better title to the goods than his transferor had in case the bill had been found or stolen by such transferor, yet a *bona fide* transferee will take the bill of lading free from the vendor's right of *stoppage in transitu* (Newhall v. Cent. P. R. R. Co., 51 Cal., 345; Lickbarrow v. Mason, 1 Sm. Lead. Cas., 895-6; Emory v. Natl. Bank, 25 O. St., 360.) And by some authorities the common carrier cannot dispute the correctness of the statement in the bill though the goods had never been received by him, when the bill of lading has passed into the hands of a *bona fide* transferee. (Armour v. Mich. C. R. R. Co., 65 N. Y., 111; Sav. Bank v. Atchison, etc., R. R. Co., 20 Kans., 519.) As between the immediate parties the bill of lading is only *prima facie* evidence of the receipt of the goods. (The Delaware, 14 Wall., 579; Grace v. Adams, 100 Mass., 505.)

When the bill of lading is attached to a bill of exchange for the purchase money of the goods, its transfer is conditional upon the payment or acceptance of the receipt of certain goods described therein, and an agreement to transport them to their place of destination, to be there delivered in good order to the consignee or his assigns. It has, therefore, a double character, being both a receipt and contract for the carriage of goods. As a receipt, it has become, under the influence of commercial custom, a symbol of property and passes title to the goods by delivery in the same manner as if the goods were themselves delivered." *Id.*

ance of the bill according to its tenor (Marine Bank v. Wright, 48 N. Y., 1.) If such bill of exchange is payable on demand, it cannot be surrendered by the holder until the vendee has accepted and paid it, unless the vendee has a right to the goods without payment. (Bank v. Bayley, 115 Mass., 228; Heiskell v. Farmers' etc. Bank, 89 Pa. St., 155) Where the bill of exchange is payable at a future time, and in the absence of an agreement to the contrary, the bill of lading may be surrendered to the vendee upon his accepting the bill of exchange, and the vendee may make its surrender the condition of his acceptance. (Tiedeman, Com. Pap., Sec. 496; National Bank v. Merchants' Bank, 91 U. S., 93)

Sec. 865. CERTIFICATES OF STOCK AS QUASI-NEGOTIABLE INSTRUMENTS.—Certificates of stock are regarded as *quasi*-negotiable instruments, since they are intended for transfer, and to some extent the transferee gets a better title than his transferor had. Though some of the rights of a *bona fide* purchaser of stock arise rather from the principles of agency than those of negotiability. The delivery of the stock is not necessary to the transfer, but the certificate is regarded as a muniment of title and the holder, if an innocent purchaser, will take a superior title to a prior purchaser by agreement, though the transfer to the first purchaser has been made on the books of the corporation. (Driscoll v. Bradley, etc., Co., 59 N. Y., 96; Bank

v. Lanier, 11 Wall., 369.) But the full rights of a *bona fide* holder are not accorded to the transferee of stock, and the real owner may recover lost, stolen, or otherwise unlawfully transferred stock, though in the hands of an innocent purchaser. (Railroad v. Howard, 7 Wall., 415; Burton's Appeal, 93 Pa. St., 214.)

Sec. 866. WAREHOUSE RECEIPTS AS QUASI-NEGOTIABLE PAPER.—Warehouse or elevator receipts for a stated amount of grain of a certain kind or quality are issued by the public warehousemen for grain stored with them, to be delivered to the depositor or his order on demand. These receipts, like bills of lading, represent the grain itself, and their sale or transfer operates a sale or transfer of the grain. By statute in some States, and also by custom these receipts have come to possess some of the qualities of negotiable instruments. But in the absence of statute they are denied to be negotiable instruments, since they call for the delivery of goods and not the payment of money. (2d Natl. Bank v. Walbridge, 19 O. St., 419; Canadian Bank v. McCrea, 40 Ill., 281.) The receipt will not assist the *bona fide* holder to recover from the warehouseman, in case his agent issued it without getting the grain. (Burton v. Curyea, 40 Ill., 320.) And the warehouseman is not charged with the liability of a guarantor where the receipts are by statute made negotiable. (Hale v. Milwaukee Dock Co., 29 Wis., 492.)

Sec. 867. LETTERS OF CREDIT AND CIRCULAR NOTES.—A letter of credit is a written statement addressed to an individual or to any one to whom it may be delivered, to the effect that the writer is prepared to meet drafts drawn on him by the person named in the letter to a stated amount. When drawn to an individual it is called a special letter of credit, and when not addressed to an individual it is called a general letter of credit, and will bind the writer to any one who advances money as directed by it. Where the letter of credit directs the drawing of a bill of exchange on the writer, it is deemed an acceptance of the bill when drawn. (*Agra v. Masterman's Bank*, 2 L. R. Ch. App., 297; *Bissell v. Lewis*, 4 Mich., 450.)

A circular note is a form of a special letter of credit authorizing any one of a list of banks or bankers in various places, to advance money on drafts drawn by the person named and to look to the writer for indemnity.

(End of Negotiable Instruments.)

PART II.

THE LAW OF SURETYSHIP AND GUARANTY.

CHAPTER I.

THE CONTRACT DEFINED AND EXPLAINED.

Sec. 868. SURETYSHIP AND GUARANTY DEFINED AND DISTINGUISHED. — Suretyship is a contract by which one person obligates himself to be responsible for the debt, default or miscarriage of another. The person thus obligating himself is called a "surety," and the person for whom he engages is the primary or principal debtor, and sometimes called simply "principal." The term suretyship further denotes the relation in which the surety stands towards the primary debtor and the creditor whose claim he assures.*

*"A surety is defined as a person who, being liable to pay a debt or perform an obligation, is entitled, if it is enforced against him, to be indemnified by some other person, who ought himself to have made payment or performed before the surety was compelled to do so." (Smith v. Sheldon, 35 Mich., 42.)

"The contract of suretyship has been defined to be a contract whereby one person engages to be answerable for the debt, default or miscarriage of another. It is an obligation accessory to that of the principal debtor; the debt is due from the

A contract of guaranty is likewise a contract to answer for the debt, default or obligation of another; the "guarantor" being the one thus engaging, while the creditor to whom he makes the promise is styled the "guarantee," and the party for whom the guarantor engages is still the principal or primary debtor.*

While the terms guaranty and suretyship are frequently used synonymously, and the definitions show slight difference if any, yet they are distinguishable by important differences. Thus in *McMillan v. Bull's Head Bank*, 32 Ind., 11, it is said: "The surety is bound with his principal as an original promisor; he is a debtor from the beginning, and must see that the debt is paid, and is held ordinarily to know every default of his principal, and cannot protect himself by the mere indulgence of the creditor, nor by want of notice of the default of the principal, however such indulgence or want of notice may in fact injure him. On the other hand, the contract of a guarantor is his own separate contract; it is in the nature of a warranty by him that

principal, and the surety is merely a guarantor for its payment. Hence it is of the essence of the contract that there should be a valid obligation of the principal debtor; also, that the surety may, in general, avail himself of any defence which his principal could make, while a defence which the principal has precluded himself from making, or has waived, cannot be made by the surety." (*Evans v. Kneeland*, 9 Ala., 42.)

*The words "guaranty" and "warranty" are derived from the French verb *garantir*, meaning to undertake, vouch for, secure, or indemnify. The verb in English is spelled both "guaranty" and "guarantee." See *Abbott's Law Dict.* "Guarantee."

the thing guaranteed to be done by the principal shall be done,—not merely an engagement jointly with the principal to do the thing. The original contract of the principal is not his contract, and he is not bound to take notice of its non-performance; therefore the creditor should give him notice; and it is universally held, that if the guarantor can prove that he has suffered damage by the failure to give such notice, he will be discharged to the extent of the damage thus sustained. It is not so with a surety ”*

**La Rose, et al v. Logansport Bank*, 102 Ind., 332; *Reigert v. White*, 52 Pa. St., 438; *Harris v. Newell*, 42 Wis., 687; *Brandt, Sur. & Guar.*, Sec. 1.

“A surety undertakes to pay if the debtor does not, and, in general, a guarantor undertakes to pay if the debtor cannot.” (*Swan's Treatise*, p. 567.)

“The surety is the guarantor of the payment of the face value of the note, who assumes this liability by becoming a regular party to the paper, as drawer or indorser, but usually as co-maker of a promissory note. Where the surety is co-maker, the obligation to pay becomes his own immediately upon failure of the principal to pay, without any previous demand on the principal or notice of his default. . . . The guarantor is never a regular party to the commercial instrument, and his liability depends upon an independent, collateral agreement, which provides for the payment of the debt by the guarantor in case the primary debtor fails to pay.” (*Tiedeman, Com. Paper*, Sec. 415; citing *Axents v. Com.* 18, *Gratt.*, 770; *Jones v. Ashford*, 70 N. C., 176, Etc.)

“The rules of the common law as to sureties are not strictly applied to guarantors, but rather the rules of the law merchant, and the true distinction seems to be this: That a surety is in the first instance answerable for the debt for which he makes himself responsible, and his contracts are often specialties, while a guarantor is only liable when default is made by the party whose undertaking is guaranteed, and his agreement is one of simple contract.” (*Hubbard, J.*, in *Curtis v. Dennis*, 7 Metc., 510.)

Sec. 869. GENERAL REQUISITES OF THE CONTRACT, HISTORY AND AUTHORITIES.

—In general, to constitute the contract of suretyship or guaranty the same essentials are necessary as in any simple contract; thus the parties should be competent to contract, their minds should meet in agreement, and the contract should be upon sufficient consideration unless made under seal. (Brandt, Sur. & Guar., Sec. 3; Snyder v. Click, 112 Ind., 293.) To satisfy the statute of frauds the contract must also be in writing. (Ingersoll v. Baker, 41 Mich., 48.)

The contract of guaranty or suretyship extends back to the remotest times; the Bible mentions the fact that sureties were held to their obligations among the Hebrews *. Among the authorities and writers on the law of suretyship and guaranty, may be mentioned almost every writer on Negotiable Instruments or Commercial Paper, as the two subjects are usually treated in connection. Fell, Baylies, Brandt, and De Colyer are writers of separate treatises on the subjects of Guaranty and Suretyship

Sec. 870. WHO MAY BECOME A SURETY OR GUARANTOR.—In addition to natural persons of the requisite capacity, surety companies, or corporations authorized by statute to guaranty bonds and undertakings or the fidelity of officers in

*“He that is surety for a stranger shall smart for it, and he that hateth suretyship is sure.”—Proverbs XI, 15.

positions of public or private trust, may become sureties or guarantors. (Cramer v. Tittle, 72 Cal., 12; Hurd v. Hannibal, etc., R. R. Co., 33 Hun., 109.)

And individuals becoming guarantors or sureties contrary to a statute or rule of court will be bound by their obligations. Thus an attorney would be bound by his contract though the statute or rule of court forbade attorneys from becoming sureties. (Tessier v. Crowley, 17 Nebr., 207; Kohn Bros. v. Washer, 69 Tex., 67.) And a non-resident accepted as bail contrary to the statute was held bound by his contract. (Com. v. Ramsay, 2 Duvall, Ky., 386.)

Married women cannot become sureties for their husbands or strangers in the absence of enabling statutes, and in general a married woman cannot charge her separate equitable estate by becoming a surety. (Yale v. Dederer, 18 N. Y., 265; Curtan v. David, 18 Nev., 310.) But where the enabling statute allows her to contract as a *feme sole*, or for any lawful purpose, she may become a surety. (Mayo v. Hutchinson, 57 Me., 546; Low v. Anderson, 41 Ia., 476.) In a few States statutes have been passed providing that a married woman cannot bind her estate by a contract of suretyship. (Nixon v. Whitely, 102 Ind., 360; Beatie v. Calhoun, 73 Ga., 269; Sweazy v. Kammer, 51 Ia., 642.)

Sec. 871. THE CONSIDERATION FOR THE PROMISE OF THE SURETY OR GUARANTOR.—Except when under seal, the contract of

the surety or guarantor must be supported by a sufficient consideration, and this is determined by the same principles as govern in the case of the ordinary contract. The smallness of the amount of the consideration does not matter, so long as it is not such a consideration as would be opposed to public policy. (Davis v. Wells, 104 U. S., 159; Rouse v. Glissman, 29 Ill. App., 321.)

"When the guaranty is contemporaneous with the creation of the original liability, the same consideration will support the guaranty which supports the principal contract. In such a case the credit is given to both, and not to one alone, although only one may derive any substantial benefit from the transaction.* But where the guaranty is given after the principal contract is made, the guaranty must be supported by a new and independent consideration, unless it was given subsequently, in pursuance of a contemporaneous agreement to that effect."

Thus where the promise that a surety or guarantor will become liable is given as an inducement to the creditor to extend credit to the principal, this is a

*Draper v. Snow, 20 N. Y., 331; Campbell v. Knapp, 15 Pa. St., 27. "It is not necessary to the validity of the consideration that any portion of it should move from the creditor to the surety or guarantor, provided that the circumstances are such that a previous request on the part of the surety or guarantor is held to exist. A consideration moving to the principal alone contemporaneous with or subsequent to the promise of the surety or guarantor is sufficient." (Brandt, Sur. & Guar., Sec. 15; Savage v. Fox, 60 N. H., 17; Bicksford v. Gibbs, 8 Cush., 154.)

sufficient consideration to support the contract of the surety or guarantor who subsequently signs. (Paul v. Stackhouse, 38 Pa. St., 302; Standley v. Miles, 36 Miss., 434.)*

A promise for a promise will be a sufficient consideration to support the contract of the guarantor or surety, as where the creditor agrees to extend the time of payment and the guarantor or surety thereupon agrees to be answerable for the debt. (Fuller v. Scott, 8 Kans., 25; Lee v. Wisner, 38 Mich., 82.)

But an executed consideration to the principal, that is, where the consideration is founded on something already done and passed, as on account of further time already given to the principal, such by-gone consideration is not sufficient to support the promise of the guarantor or surety, and the contract will be void, except where there was a previous request by the surety or guarantor to the creditor (Williams v. Marshall, 42 Barb., 524; Ludwick v. Watson, 3 Oreg., 256; Ashton v. Bayard, 71 Pa. St., 139.) If the written promise of the surety to answer for the debt of another, be made in consideration of something *to be* done, as in consideration of goods to be supplied,

*"If A executes his note to B, and X, at the time the note is made, indorses his name on the back of it, he thereby becomes surety for A, the same as if he signed his name to the note with A, in the absence of an agreement in regard to the extent of the responsibility of X; and consequently there is a sufficient consideration for his promise. But if A executes his note to B, and X, having no concern with the note at the time that it is made, afterwards indorses his name on the back of it, he is not liable unless there was a sufficient consideration therefor." (Swan's Treatise, p. 572.)

legal proceedings to be staid, and the like, the consideration is sufficient. (*Westhead v. Sproson*, 6 H. & N., 728).*

Sec. 872. BOND GIVEN WHEN NOT REQUIRED, OR IN DIFFERENT FORM BINDS SURETY.—A voluntary bond, or one given when none is required by law, or in a different form from the one required binds the surety. Thus, the bond of a plaintiff in an attachment suit though not required binds the sureties and is valid. (*Lartigue v. Baldwin*, 5 Martin, La., 193.) And the sureties upon the bond of a State treasurer, and a deputy collector of customs, where the bond was voluntarily given and not demandable by law were nevertheless held bound by their obligation. (*Sooy ads. the State*, 38 N. J. L., 324; *Dignan v. Shields*, 51 Tex., 322.) And where a bond was required of bank cashier with two or more sureties, and the bond was given with but one surety, the single surety was held liable on the bond. (*Pritchett v. the People*, 1 Gilman, Ill., 525; *Bank of Brighton v. Smith*, 5 Allen, 413.)

*See Brandt on Sur. & Guar., Sec. 16. In *Jackson v. Jackson*, 7 Ala., 791, Collier, C. J., said: "Any act in the nature of a benefit to the person who promises, or to any other person upon his request, or any act which is a trouble or detriment to him to whom the promise is made, is sufficient, and the amount of benefit or of trouble or of detriment or its comparative value in relation to the promise is indifferent." And the consideration need not be a benefit to the principal or surety, any trouble, detriment, or inconvenience to the creditor is sufficient. (*Pillans v. Van Mierop*, 3 Burr., 1663; *Wells v. Mann*, 45 N. Y., 327.)

Sec. 873. SURETY MAY BE BOUND THOUGH NAME NOT IN BODY OF WRITING, AND HIS OBLIGATION MAY ARISE BY IMPLICATION.—Where the intention is clear from the writing and signature who is the surety, it is not necessary that the name of the surety appear in the body of the instrument. So where a blank is left intended for the name of the surety, and the instrument is signed, sealed and delivered, the signer is bound. (*Bartley v. Yates*, 2 Hen. & Mun., Va., 398; *Partridge v. Jones*, 38 O. St., 375.) But it is held where the penalty of the bond is left blank, the sureties are not bound. (*Austin v. Richardson*, 1 Gratt., 310.)

The obligation of a surety or guarantor is sometimes implied by law from the circumstances surrounding a person who sells or transfers a negotiable instrument, in the same manner as a warranty is implied in the case of the sale of goods. Thus in the transfer of a promissory note by indorsement without recourse, the transferee impliedly guarantees the genuineness of prior signatures, and this is so as regards the party selling such a note without indorsing it. (*Dumont v. Williamson*, 18 O. St., 515; *Lyons v. Miller*, 6 Gratt., 427; *Cabot Bank v. Morton*, 4 Gray, 156.)

Sec. 874. WHEN JOINT MAKER OF NOTE MAY BE SHOWN TO BE A SURETY BY PAROL EVIDENCE.—Where several parties sign a joint, or joint and several note, not under seal, if

one or more of them are sureties, and the creditor is cognizant of the fact, parol evidence is admissible to show that they were sureties and that the creditor had knowledge of their signing as such, and this is true though there is nothing in the note to indicate that any of the parties are sureties. Such parties are sureties to all intents and purposes, and the creditor must deal with them as regards protecting their rights as in the case of any other surety. Any act by the creditor which would discharge a surety will discharge them. (*Sefton v. Hargett*, 113 Ind., 592; *Piper v. Newcomer*, 25 Ia., 221; *Higdon v. Bailey*, 26 Ga., 426.) The apparent change in the terms of the contract made by the introduction of such parol evidence is held to be but the proof of a collateral fact and not a controverting of the terms of the contract. (*Rose v. Williams*, 5 Kans., 438; *Carpenter v. King*, 9 Met., 511.)

By a number of cases it is held that a joint maker of a sealed note may show that he was in fact a surety and that the creditor had notice of the fact. (*Creigh v. Hedrick*, 5 W. Va., 140; *Forbes v. Shepard*, 98 N. C., 111.) Other cases deny that parol evidence may be introduced for this purpose when the instrument is under seal, in actions at law, but admit such evidence in courts of equity. (*Burke v. Cruger*, 8 Tex., 66; *Levy v. Hampton*, 1 McCord, L. [S. C.], 145.)

And, in general, where the creditor at the time of doing an act which will discharge an ordinary surety, has knowledge that a party is in reality a

surety, this will discharge such party, though the creditor did not know beforehand that such party was in fact a surety. Thus where the holder of an instrument did not know that one of the parties was a surety at the time of taking it, but was afterwards,—and before doing the act operating as a discharge of the surety,—informed of it; held, that the surety was discharged. (*Bank of Mo. v. Matson*, 26 Mo., 243; *Pooley v. Harradine*, 7 E. & B., 431.)

Parol evidence is also admissible to charge a party who had added the word "surety" or the like to his signature to a promissory note as a principal. Such addition to a signature is held to be simply presumptive evidence of suretyship, and may be rebutted by proof of the fact. (*Rose v. Madden*, 1 Kans., 445; *Boulware v. Admrs.*, 83 Va., 679.)

But where a surety in terms binds himself as a principal by adding the word "principal" after his name, he cannot by parol evidence show that he was in reality a surety. Thus where three persons signed a note, joint and several, and one added "principal" to his signature and the other two adding "surety" to theirs, it was held that the party using the word principal could not show by parol evidence that he was a surety and known as such by the creditor. The addition of such word indicates a waiver of his rights as surety. (*Picot v. Signiago*, 22 Mo., 587; *Derry Bank v. Baldwin*, 41 N. H., 434)

Sec. 875. WHEN SURETY ESTOPPED TO DENY RECITALS OF FACTS IN WRITTEN OBLIGATION.—“The general rule is that sureties are estopped to deny the facts recited in the obligations signed by them, and this whether the recitals are true or false in fact. Having once solemnly alleged the existence of the facts they cannot afterwards be heard to deny it.”*

Likewise sureties on notes or bonds executed to a corporation or partnership are estopped from denying the legal existence of such corporation or partnership. (*Jackson v. Foote*, 12 Fed. Rep., 37.) And a surety on a bond is held estopped from denying liability because the bond is different from what he thought it was, where he was not prevented from reading the same by the fraud of the obligee. (*Johnston et al. v. Patterson*, 114 Pa. St., 398.)

But in some cases the surety is not estopped from denying the facts stated in his obligation. Thus in a suit upon a township bond, which recited that the officers executing it had been authorized so to do, the township was not estopped from showing that no such authority had been given. (*Hudson v.*

**Brandt, Sur. & Guar., Sec. 42; Monteith v. Commonwealth*, 15 Gratt., 172; *Decker v. Judson*, 16 N. Y., 439. Where the holder of the bond of a corporation guaranteed it, and afterwards in a suit against him on the guaranty he attempted to set up the fact that the corporation had no authority to make it and it was invalid, he was held to be estopped from showing these facts, the court saying: “The guaranty of the payment of the bond by the defendant imports an agreement or undertaking that the makers of the bond were competent to contract in the manner they have, and that the instrument is a binding obligation upon the makers.”

Inhab. of Winslow, 6 Vroom [N. J.], 437.) So where the bond of an officer is sued upon, the surety is not estopped from setting up the fact that the appointment of the officer was void or illegal. (Thomas v. Burrus, 23 Miss., 550; Tinsley v. Kirby, 17 S. C., 1.)*

Sec. 876. NEGOTIABILITY OF GUARANTIES DISCUSSED.—While a person who holds the guaranty of another may assign the right of action on the guaranty by express words so that the transferee may thereafter enforce the guaranty either in the name of the assignor or in his own name, there is a conflict of authorities in regard to the guaranty of a negotiable instrument passing to the subsequent indorsee or holder when the paper which the guaranty covers has been transferred to such indorsee or holder. Professor Tiedeman states that the authorities generally agree that when the guaranty is written on a separate paper, it will not be negotiable so far as to pass as appurtenant to the bill or note to a subsequent holder, unless words of negotiability are incorporated in the guaranty. (Com. Pap., Sec. 419.) So that a guaranty written on a

*In *Miller v. Bagwell*, 3 McCord, Law, S. C., 429, Nott, J., states the reasons for allowing the recitals to be controverted as follows: "It is a general rule of law, and a correct one, too, that a man cannot aver against his own deed; but that is where he has alleged some particular fact within his own knowledge and which forms a part of the consideration for his undertaking; and that is the whole extent to which the cases relied on go. But the principle cannot be extended to an allegation coming from the other party, and which can be necessarily known only to him, although contained in the recital of a deed made by the defendant."

separate paper and not in terms negotiable, could not be sued on by the holder to whom the original paper had been transferred, but a suit might be brought on it in the name of a person to whom it was first given. (McLaren v. Watson's Admrs., 26 Wend., 425; *contra*, Gould v. Ellery, 39 Barb., 163.) Where the guaranty is written on the negotiable instrument which it guarantees contemporaneously with its execution, the authorities are divided; in a number of cases it is held negotiable and in others not negotiable.*

And where the guaranty is written on the paper at the time of its transfer by the transferor, the question of its negotiability is in dispute.** In Potter v. Gronbeck, 117 Ill., 404, it is held that a guaranty covering the payment of rent and other covenants on the part of a lessee could not be assigned so as to pass a legal title to the assignee.

Sec. 877. WHEN OFFER OF GUARANTY MUST BE ACCEPTED.—An offer of suretyship or guaranty must be accepted the same as any other offer if the party offering is to be bound. Where

*The following cases hold the guaranty negotiable: Cole v. Merchants' Bank, 60 Ind., 350; Webster v. Cobb, 17 Ill., 466; Northumberland Bank v. Eyer, 58 Pa. St., 97; Jones v. Dow, 142 Mass., 130. *Contra* cases are: Springer v. Hutchinson, 19 Me., 359; Tinker v. McCauley, 3 Mich., 188; Simth v. Dickinson, 6 Humph. [Tenn.], 261.

**Johnson v. Mitchell, 50 Tex., 212; Robinson v. Lain, 31 Ia., 9; Gage v. Mechanics' Bank, 79 Ill., 62, are cases holding such guaranties negotiable, while Trust Co. v. Natl. Bank, 101 U. S., 70; Taylor v. Binney, 7 Mass., 481; Miller v. Gaston, 2 Hill., 188, hold the contrary.

the parties deal together personally, or a single specific liability is guarantied, formal notice of acceptance by the creditor is unnecessary. (*Walker v. Forbes*, 25 Ala., 139; *Montgomery v. Kellogg*, 43 Miss., 486.) When the guaranty covers a future and continuing credit, unless it refers specifically to a certain line of credit which it absolutely guaranties, indicating a previous request for a guaranty, it should be formally accepted by notice sent to the guarantor of the creditor's intention to rely upon the guaranty. (*Sheurll v. Knox*, 2 Am. Lead, Cas., 104; *Babcock v. Bryant*, 12 Pick., 133; *Davis v. Wells, Fargo & Co.*, 104 U. S., 159; *contra*, *Powers v. Bumcranz*, 12 O. St., 284.)

And, unless the guarantor waive notice of acceptance, it must be given to bind him upon a general letter of credit. (*Tiedeman*, Com. Pap., Sec. 420; *Russell v. Clarke*, 7 Cranch, 69.) This is to enable the guarantor to know to whom he is liable.

Sec. 878. FORMS AND KINDS OF GUARANTIES.—There is no specific form required to constitute a guaranty, and it is sufficient if it indicates the intent of the party to assume the obligation. It may be written on the instrument guaranteed, or be given in a separate writing, and before the statute of frauds could be oral. It may in terms be absolute or conditional upon some future event or contingency; limited or unlimited as to the amount, time, and number of transactions. (*Tiedeman*, Com. Pap., Sec. 416.)

When a question arises as to whether a guaranty authorizing the loan of any amount not exceeding a specified sum is exhausted by a single advancement or operates as a continuing guaranty of all advances up to the amount stated, the intention of the parties will govern, and to explain the ambiguous guaranty parol evidence is admissible. While there is no general rule by which to determine whether the guaranty is continuing or not, Professor Tiedeman states that, where the language used is singular in number it will be considered exhausted by the first loan, while if the plural number is used, indicating an authority for repeated loans within the amount, it will be held to cover all loans within the stipulated amount. (Com. Pap., Sec. 416.) Mr. Brandt, in his excellent work, simply states that no definite rule can be given for determining whether a guaranty shall be considered a continuing one or not, as the circumstances are different in almost every case, and he therefore illustrates the subject by giving the facts of decided cases, a few of which we append below:*

*Brandt, Sur. & Guar., Sec. 156. Where a guaranty read: "Mr. J. B. Maynard, being about to commence the retailing of dry goods at Connelton, Ind., and desiring to open a credit with James Lowe & Co., of the city of Louisville, I hereby undertake and contract with said Lowe & Co. to become responsible to them for the amount of any bill or bills of merchandise sold by them to said Maynard, agreeable to terms of sale agreed upon between the parties, without requiring said Lowe & Co. to prosecute suit against said Maynard therefor," it was held a continuing guaranty and not exhausted by the first few bills bought on commencing the business. (Lowe v. Beckwith, 14 B. Monr. Ky., 150.) So the writing, "I hold myself

Sec. 879. LIMITATIONS OF SURETY'S CONTRACT AS REGARDS TIME, ACT OR AMOUNT.—When a person is surety for the honesty of another in an office of limited duration, to which he has been appointed for a limited time only, such surety is not bound beyond that period, though the officer is re-elected or re-appointed, unless the guaranty, by an express provision, extend the obligation beyond the original term. (*Thompson v. Young*, 2 Ohio, 334; *Arlington v. Merricke*, 2 Saund., 403; *Sidner v. Alexander*, 31 O. St., 378.)

accountable to you for any goods Mr. Francis Murphy may purchase of you to the amount of £250, currency," is a continuing guaranty, (*Ross v. Burton*, 4 Up. Can. Q. B., 357); and also the words, "Sir, you can let J. L. Day have what goods he calls for, and I will see that the same are settled for." (*Hotchkiss v. Barnes*, 34 Conn., 27.)

But where the guaranty was in the form of a letter: "The object of the present letter is to request you, if convenient, to furnish them (the principals) with any sum they may want, so far as \$50,000, say \$50,000. They will reimburse you the amount, together with interest, as soon as arrangements can be made to do it. . . . We shall hold ourselves answerable to you for the amount," it was held to be exhausted by the first advance of \$50,000 and not a continuing guaranty. (*Cremer v. Higginson*, 1 Mason, 323.) And a guaranty in the following form was held not to be a continuing guaranty: "Sir, for any sum that my son, George Reed, may become indebted to you, not exceeding \$200, I will hold myself accountable." (*White v. Reed*, 15 Conn., 457.) So where the letter of guaranty asked that a full line of samples of goods be sent for a stated season, and concluded, "and I will guaranty the payment of any goods you may sell him," it was held to cover but one transaction or sale of goods. (*Schwartz v. Hyman*, 107 N. Y., 562.) And a letter stating "The bearer, . . . my son-in-law, wishes to place a stock of groceries in his provision and meat store. . . . To enable him to do this, I am willing to be responsible to you for the amount of groceries he may order of you," was held not to be a continuing guaranty. (*Knowlton v. Hersey*, 76 Me., 345; Chapter V. Brandt Sur. & Guar.)

The last case holding that moneys received during the first term, and in the officer's hands when executing bond for second term, are covered by first bond and not by second. So where a surety on a bond providing that a clerk should properly demean himself, "from time to time and at all times, so long as he should continue to hold said office or employment," showed that the employment was but for a year, the creditor could not set up that by consent of all parties the clerk had been retained beyond the year and had made default. (*Peppin v. Cooper*, 2 Barn & Ald., 431.)

And it is held where the bond of the surety is general covering the entire period for which the principal shall remain in office, and the salary of the principal is increased at the end of the year, such change of terms revokes the first appointment and releases the surety. (*Bamford v. Iles*, 3 Wels., Hurl. & Gor., 380.) And where the general bond of a cashier of a bank, was extended by the re-chartering of the bank without a new bond, the sureties were not held for a default by the cashier made after the time of the expiration of the original charter. (*Thompson v. Young*, 2 Ohio, 335.) But where the terms of the bond indicate the intention of the surety to be bound beyond the term for which the officer is elected or appointed, as where the words were: "during the whole time of continuing in said office, in consequence of the said election, or under any annual or other future election . . . to the said office," the surety will be bound for any default

while the person remains in office. (Oswald v. Mayor of Berwick, 5 H. L. Cas., 56.)

Sec. 880. EFFECT OF THE STATUTE OF FRAUDS UPON THE CONTRACT.—By the fourth section of the Statute of Frauds, (29 Charles II., ch. 3.) and re-enacted in the various States in almost identical terms, it is provided: "No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized." The general effect of this section is that the contract of a surety or guarantor being a promise to answer for the debt of another, must be in writing or a suit cannot be maintained upon it. As this section of the Statute of Frauds has already been considered under the subject of Contracts* it is not necessary to enter upon a lengthy discussion of it here.

As regards the extent of the writing necessary to satisfy the Statute of Frauds the rule differs in the various States. In some a statement of the consideration is required. (Rigby v. Norwood, 34 Ala., 129; Nichols v. Allen, 23 Minn., 543.) Others hold that the consideration is no part of the "agreement" and need not be stated. (Reed v.

*See No. 4, of the Home Law School Series.

Evans, 17 Ohio, 128; *Gillighan v. Boardman*, 29 Me., 79.) So where the words of the statute only require the "promise" to be in writing, the consideration need not appear (*Violett v. Patten*, 5 Cranch, 142). Where the consideration is held to be unnecessary, the mere signature of the guarantor on the principal obligation will be treated as a sufficient compliance with the statute, as where one not a party to a negotiable instrument puts his name on the back of it. (*Nelson v. Dubois*, 13 Johns, 175.)

In order that the contract of the surety or guarantor come within the operation of the statute as a promise to answer for the debt or default of another it must be collateral to a liability on the part of the principal debtor, that is, the principal debtor must not be entirely discharged by the obligation of the surety. If at the time of the surety's promise there is an actual primary liability of a principal to the promisee which continues after the making of the promise, the contract is within the statute and must be in writing to be valid.*

Where the contract of the surety extinguishes the

*Thus in the leading case of *Birkmyr v. Darnell*, 2 Ld. Raymond, 1085, S. C., 6, Mod., 248, and 1 Salk., 27, the distinction between a collateral and original promise is thus illustrated: "If two come to a shop and one buys, and the other, to gain him credit, promises the seller, 'if he does not pay you I will,' this is a collateral undertaking, and void without writing by the Statute of Frauds. But if he says, 'let him have the goods, I will be your paymaster,' or 'I will see you paid,' this is an undertaking as for himself, and he shall be intended to be the very buyer, and the other to act but as his servant."

first contract, so that the first debt no longer exists, and the principal debtor is not liable thereon, the contract of the surety is binding though not in writing. (*Estabrook v. Gebhardt*, 32 O. St., 415; *Anderson v. Spence*, 72 Ind., 315; *Read v. Nash*, 1 Wils., 305.) And where the contract of the surety is to pay his own debt to a person designated by his creditor, in discharge of a debt owing to such person by his creditor, this agreement need not be in writing.*

“When the promise to pay the debt of another is made in consideration of the delivery by the creditor to the promisor of a security for such debt, or of an assignment of the debt itself to the promisor—that is, when the transaction amounts to a sale by the creditor to the promisor of the lien or debt—the promise is not within the statute.” (*Brandt, Sur. & Guar.*, Sec. 65; *Castling v. Aubert*, 2 East, 325.)

When there is a sale of goods to one person and a promise to pay the debt by another, if the person to whom the goods are furnished is at all liable, the promise of the surety must be in writing to bind him. But where the goods are given on the credit of a person, and at his request delivered to another, to whom no credit is given, and who incurs no responsibility, the person to whom the credit is

*“If A be indebted to B, and B be indebted to C, and they get together and agree that B’s debt to C shall be canceled, and A shall pay the debt which he owed B to C, such agreement is valid and binding without writing.” (*Brandt, Sur. & Guar.*, Sec. 66; *Hodgson v. Anderson*, 3 B. & C., 842; *Barker v. Bucklin*, 2 Denio, 45.)

given, being solely responsible, the contract need not be in writing. (Swan's Treatise, p. 570.) So where there is a promise to answer for a party not legally competent to contract, or not answerable for his wrongful acts, the promise need not be in writing, as there is no collateral liability the principal not being bound. Thus a father who promised verbally to answer for goods supplied by a merchant to his minor son was held bound, because the son not being of age to become liable for the debt, it was held to be the separate, independent and original debt of the father. (Chapin v. Lapham, 20 Pick., 467; Harris v. Huntbach, 1 Burrows, 373.)

"The Statute (of Frauds) was intended to apply to promises made to the person to whom the debt is *due*, and in order to secure its payment *to him*. There is, therefore, a class of cases that do not come within the operation of the statute, because the promise is either to the person who *owes* the debt, or, though made to the person to whom the debt is due, is not made to secure its payment. Thus, if there is a suit by A against you, and B promises to pay him \$50 if he will withdraw the suit, and he does it, B is liable on his promise, though not in writing; for the promise is not to pay your debt, but a sum of money distinct from, and independent of it."*

*Swan's Treatise, p. 570: "A promise, however, to indemnify A for assuming the debt of B, or a promise by A to B to indemnify B against loss in becoming surety for C, is void, if not in writing; but a promise by one co-surety, to indemnify the other, need not be in writing; for it is a promise to secure one's own default." (Id., citing Oldham v. Broom, 28 O. St., 41.)

So where the promise of the surety is to pay the debt of another out of the proceeds of such other's property in the hands of the surety for the purpose, the promise need not be in writing. (*Meyer v. Hartman*, 72 Ill., 442; *Stoudt v. Hine*, 45 Pa. St., 30.) The promise of the surety is considered original, and he is regarded as an agent to distribute the property. (*Brandt, Sur. & Guar.*, Sec. 63.) "Where the plaintiff, in consideration of the promise, has relinquished some lien, benefit or advantage, for securing or recovering his debt, and where by means of such relinquishment the same interest or advantage has inured to the benefit of the defendant, there his promise is binding without writing. . . . It is not enough that the plaintiff has relinquished an advantage or given up a lien in consequence of the defendant's promise, if that advantage has not directly inured to the benefit of the defendant, so as to make it a purchase by the defendant from the plaintiff." (Per Shaw, C. J., in *Curtis v. Brown*, 5 Cush., 488.)

"Whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability." (Per Clifford, J., in *Emerson v. Slater*, 22 How., 28.)

Sec. 881. SAME SUBJECT.—EFFECT WHEN THE CONTRACT IS WITHIN THE STATUTE AND NOT IN WRITING.—The words of the Statute of Frauds are, “no action shall be brought,” and these do not make a contract not complying with its provisions illegal or void, but render it incapable of being enforced. In case the surety voluntarily pays the debt where he could not have been compelled so to do because his contract was not in writing, he cannot recover it; the contract being entirely executed on both sides, the statute will not affect the relations of the parties. (*Stone v. Dennison*, 13 Pick., 1; *Shaw v. Woodcock*, 7 Barn. & C., 73.) The statute affects the remedy, hence a verbal contract of suretyship valid by the law of the country where made will not be enforced in a country requiring the contract to be in writing. (*Leroux v. Brown*, 12 Com. B., 801.)

When a promise is divisible as to the thing promised and partly within and partly without the Statute of Frauds, it is held, that if the parts of the promise are so connected as to make one entire contract, rather than distinct promises, the contract will be wholly unenforceable; while if the portion not within the statute can be separated from the part of the promise that is, an action may be brought on the valid portion.*

**Brandt Sur. & Guar.*, Sec. 52; *Wood v. Benson*, 2 Crompt. & Jer., 94; *Wetherbee v. Potter*, 11 Allen, 361; *Theob. Prin. & Sur.*, 278.

CHAPTER II.

LIABILITY OF SURETY OR GUARANTOR—HOW DISCHARGED ETC.

Sec. 882. CONSTRUCTION OF CONTRACT OF SURETY OR GUARANTOR.—“In guaranties, letters of credit, and other obligations of sureties, the terms used and language employed are to have a reasonable interpretation according to the intent of the parties, as disclosed by the instrument read in the light of the surrounding circumstances and the purposes for which it was made. If the terms are ambiguous, the ambiguity may be explained by reference to the circumstances surrounding the parties, and by such aids as are allowable in other cases, and if an ambiguity still remains, I know of no reason why the same rule which holds in regard to other instruments should not apply; and if the surety has left anything ambiguous in his expressions, the ambiguity may be taken most strongly against him.” (Per Allen, J., in *Belloni v. Freeborn*, 63 N. Y., 383.) This statement is a fair summary of the general rule of construction as regards the contracts of the surety or guarantor. (*Lawrence v. McCalmont*, 2 How. [U. S.], 426; *Wills v. Ross*, et al., 77 Ind., 1.)

Another general rule applying to the contract of the surety or guarantor is, that they are regarded as

favorites of the law, and are not bound beyond the strict terms of their engagement, when such terms have been ascertained. (*People v. Chalmers*, 60 N. Y., 154; *Brandt, Sur. & Guar.*, Sec 93.) It is held to be well settled that the guarantor or surety is bound only by the strict letter or precise terms of the contract of his principal, whose act he has guaranteed. He has a right to stand upon the very terms of his contract, and if he does not assent to any variation of it, and a variation is made it is fatal. (*Kingsbury v. Westfall*, 61 N. Y., 356; *Miller v. Stewart*, 9 Wheat., 680.) The reason for the surety being treated as leniently as possible is obvious, since he is not paying his own debt or obligation, but that of another, and should not be charged beyond his specific agreement. (*Ludlow v. Simond*, 2 Caines' Cas. in Error, 1.)

The contract of the surety or guarantor is construed to cover a future or prospective liability, and unless expressly stated to cover delinquencies prior to its execution, it will have no retroactive effect. Thus, where the promise of the guarantor was to pay for all coal supplied the principal at an agreed price within a certain time, it was held to apply only to future contracts fixing terms of payment. (*Delaware, L. & W. R. R. Co. v. Burkard*, 114 N. Y., 197.) And in *Weir Plow Co. v. Walmsley*, (110 Ind., 242), it was held that a surety for a commission merchant was not liable for a default respecting goods bought by and in the possession of the principal prior to the execution of the contract. And

a guaranty for the payment of rent under a lease covering "any default" in the payment of the rent, was held only to cover defaults in the payment of the rent after the execution of the guaranty. (*Brooks v. Baker*, 9 Daly [N. Y.], 398.)

Sec. 883. WHEN THE SURETY MAY BE SUED.—Though the contract of the surety is in effect collateral to that of the principal, yet, when by the terms of the contract the obligation of the surety or guarantor is the same as that of the principal, the creditor, upon default, may sue the surety or guarantor immediately without any proceeding against the principal. (*Penny v. Crane Bros. Mfg. Co.*, 80 Ill., 244.) No demand on the principal is necessary in such cases before suit, and the suit itself is a sufficient demand on the surety or guarantor. (*Hough v. Aetna L. Ins. Co.*, 57 Ill., 318; *Carr v. Card*, 34 Mo., 513.) This is true, also, where the creditor has a mortgage or other security, he need not exhaust the security of the principal before looking to the surety. (*Jones v. Ashford*, 79 N. C., 172.) This is the common law rule and prevails in England and the United States, except where changed by statute. By the Roman Law after the time of Justinian the surety had the right to require the creditor to pursue the principal debtor to judgment and execution, before becoming liable on his obligation.*

*Sec. 5835, Rev. Stat. Ohio, provides: "A person bound as surety in a written instrument for the payment of money, or

But where the guaranty in terms is to insure the collection of a debt of another, there is no default of the guarantor until the creditor has attempted by due course of law to collect the debt from the principal debtor. (*Ralph v. Eldredge*, 58 Hun., 203; *Lemmon v. Strong*, 55 Conn., 443.) Some cases hold that legal proceedings to collect are imperative before the liability of the guarantor attaches, and this though the principal debtor is insolvent. But the guarantor would be responsible for the costs made in the attempt to collect in such cases. (*Craig v. Parkis*, 40 N. Y., 181; *Brandt, Sur. & Guar.*, Sec. 98.) The better opinion seems to be that other competent evidence to show that the principal debtor was insolvent would take the place of an actual suit. (*Stone v. Rockefeller*, 29 O. St., 625; *Brackett v. Rich*, 23 Minn., 485.)

Where there is a guaranty of a note or bond which in terms makes the guarantor liable for the payment of the instrument, it is generally held that the holder could not look to such guarantor unless he had first been diligent in attempting to collect from the principal debtor. (*Cowles v. Peck*, 55

other valuable thing, may, if a right of action accrue thereon, require his creditor, by notice in writing, to commence an action on such instrument forthwith, against the principal debtor; and unless the creditor commences such action within a reasonable time thereafter, and proceed with due diligence, in the ordinary course of law, to recover judgment against the principal debtor . . . shall thereby forfeit the right which he would otherwise have to demand and receive of such surety the amount due thereon." And by Sec. 5845, Rev. Stat. Ohio, the surety is given a right of action against his principal, to compel his payment of the debt after it becomes due.

Conn., 251; Johnston v. Chapman, 3 Pen & Watts, 18.) So if a note is guarantied to be collectible, the creditor must exhaust the estate of all prior solvent parties before the guarantor can be made to pay. (Pittman v. Chisolm, 43 Ga., 442; McClurg v. Fryer, 15 Pa. St., 293.)

Sec. 884. SAME SUBJECT—MEANING OF “DUE DILIGENCE.”—When the contract of the surety is not the same as that of the principal, but only charges him when the creditor has exhausted his remedy against the principal, the creditor is bound to use *due diligence* in proceeding to collect from the primary obligors. Just what will constitute due diligence depends upon the circumstances surrounding each case, and is said to be that which a vigilant creditor employs when he has no other security than the obligation of the principal debtor. (Hoffman v. Bechtel, 52 Pa. St., 190.) Due diligence, in the absence of any special facts, is held to require suit to be instituted at the first regular term of court after the maturity, and the obtaining judgment and execution thereon as soon as practicable by the ordinary rules and practice of the court. (Voorhies v. Atlee, 29 Ia., 49.) The determination of the fact whether due diligence has been exercised or not is probably a mixed question of law and fact for the jury to pass upon under instructions from the court. (Brandt, Sur. & Guar., Sec. 101; Backus v. Shipard, 11 Wend., 629.) The insolvency of the principal, or the existence of war making it impos-

sible to collect debts, will excuse delay in bringing the suit to collect from the principal. (*Bashford v. Shaw*, 4 O. St., 264; *Kinyon v. Brock*, 72 N. C., 554.)

But where in a guaranty of payment, the time within which payment shall be made is fixed, and there is a default by the principal within the time specified, the guarantor is in default, and no proceedings need be taken against the principal whether insolvent or not. (*Cobb v. Little*, 2 Greenl. [Me.], 261; *Roberts v. Riddle*, 79 Pa. St., 468.) Here the terms of the contract indicate an intention to become liable immediately upon default, and not after the principal has been pursued to judgment and execution. And where the guaranty is in terms which bind the promisor to the absolute payment of the note or obligation when due, demand on the principal is not necessary to charge such guarantor. (*Brown v. Curtis*, 2 N. Y., 225; *Hooker v. Gooding*, 86 Ill., 60.)

Sec 885. LIABILITY OF SURETY FOR PAYMENT OF OVERDUE NOTES, AND FOR RENT WHEN TENANT HOLDS OVER.—

Though a note is past due, and the guaranty is to pay the note "when due," or "according to its tenor," the guarantor is bound, and is considered to have stipulated to answer for the payment of a note payable on demand, since he is understood to have contracted with reference to the overdue note. (*Crocker v. Gilbert*, 9 Cush., 131; *Gunn v. Madigan*, 28 Wis., 158.)

When there is an option in the lease for a renewal of it for another year or more upon the same terms, and the contract of the guarantor covers such lease, he is generally held for the default of the principal occurring during the period of the renewal. (*Decker v. Gaylord*, 8 Hun , 110; *Deblois v. Earle*, 7 R. I., 26) And where the guaranty of the payment of another's rent reads: "So long as said lessee shall occupy said premises," it was held to include in the word "occupy" the whole period of tenancy. (*Morrow v. Brady*, 12 R. I., 130)

Sec. 886. EXTENT OF SURETY'S LIABILITY FOR A DEBT, OR ON A BOND.—Where the contract of the surety expressly or in effect covers stipulated damages, they may be recovered. (*First Natl. Bank v. Breese*, 39 Ia., 640; *Gridley v. Capen*, 72 Ill., 11.) In general, the surety on a bond is not liable beyond the sum stated in the bond as the penalty. But when the surety is in default and neglects to pay within a reasonable time, he may be held liable for the legal rate of interest on the penal sum, as damages for the delay. (*Brainard v. Jones*, 18 N. Y., 35; *Perry v. Horn*, 22 W. Va., 381.) Such interest is held to run from proper demand, or from date of suit or service of summons. (*United States v. Curtis*, 100 U. S., 119.)

SEC. 887. LIABILITY OF SURETY ON DISCOUNTED NOTE.—The surety who has become a party to a promissory note to raise money

for the principal for a specified purpose, cannot complain if the note is discounted by another than the payee and the money applied to the purpose intended. (*Bank v. Bingham*, 33 Vt., 621.) And where a note was executed to buy a yoke of oxen of one person the surety to have a mortgage on them for security, and the principal bought the oxen of another person, who knew that the note was given to buy another pair of oxen, but did not know of the agreement as to the mortgage, both principal and surety were held liable on the note. (*Laub v. Rudd*, 37 Ia., 617.) But if the note signed by the surety for a particular purpose is diverted from that purpose, and the party taking it knew of the purpose for which it was executed, the surety will not be bound. (*Brown v. Tabor*, 5 Wend., 566.) A party taking such note in good faith for value and without notice may hold the surety regardless of the fact of the note being diverted from the purpose intended. (*McWilliams v. Mason*, 31 N. Y., 294.)

Sec. 888. LIABILITY OF GUARANTOR ON GENERAL AND PARTICULAR GUARANTY.

—A general guaranty, as a letter of credit addressed to all persons, is valid and may be enforced by any person who gives credit on the strength of it. (*Lowry v. Adams*, 22 Vt., 160.) And though addressed to a named person, to the purchaser or a third person, the guaranty may be shown by the surrounding circumstance to be

intended for the person who gives credit upon it. (*Drummond v. Preston*, 12 Wheat., 515; *Benedict v. Sherill*, Lalor's Sup. to Hill & Denio, 219.)

When the guaranty is special, that is, addressed to a named person, it must generally be acted on by such party to bind the guarantor. So where there is no ambiguity, and the letter of guaranty is addressed to an individual, it could not be enforced by a partnership who had furnished goods upon it, though the individual was a member of the partnership. (*Sollee v. Mengy*, 1 Bailey, Law, 620.) And where the guaranty authorized the furnishing of goods in "Macon" and the place was changed to "Griffin" without the guarantor's consent, it was held he was not liable on the guaranty. (*Johnson v. Brown*, 51 Ga., 498.)

And the rule that the surety is only bound by the strict letter of his contract extends to a case where the surety has become liable for a single individual and the credit has been given to several, in such case the surety is not liable. (*Bell v. Norwood*, 7 La., 95; *Connecticut Mut. L. Ins. Co. v. Scott*, 81 Ky., 540.) Likewise, where the surety has become bound for several, as for a firm, he will not be bound if the credit is given to one of the parties, as a partner in the firm after dissolution. (*Cremer v. Higginson*, 1 Mason, 323; *Pemberton v. Oakes*, 4 Russell, 154.) So a surety to or for a firm is not liable after a change in the members of the firm. (*Barnett v. Smith*, 17 Ill., 565.) So the surety on a bond to perform the award of certain arbitrators will

not be liable if the arbitrators are changed. (Mackey v. Dodge, 5 Ala., 388.)

The surety will not be held liable beyond the scope of his obligation, and if the terms of his obligation are varied, or a thing is done differently from what was intended or specified in his contract he will not be bound. (Mercer Co. v. Coovert, 6 Watts & S., 70; Ryan v. Morton, 65 Tex., 258.)

Sec. 889. LIABILITY OF GUARANTOR OR SURETY IN SPECIAL CASES.—Where a person became a surety on a bond for the hire of a slave, with a covenant for the return of the slave at the end of the period for which he was hired, it was held that the death of the slave during the period covered by the bond as a result of cruel treatment by the principal, would not discharge the surety from his liability for the return of the slave. (Carney v. Walden, 16 B. Monr., 388.) The surety was held because he was regarded as a joint covenantor with the principal, and neither could excuse his liability on the ground that the other by his wrongful act had made performance impossible.

Where the surety stipulates that the payment shall be made by the principal part in cash and balance in "good obligations," he is not responsible for bad notes taken and receipted for by the creditor. (Corbet v. Evans, 25 Pa. St., 310.) And when the surety's promise is to make good a balance remaining due after "sale" of mortgaged property of principal, the surety is not in default until

the sale is completed. (*Moor v. Roberts* 3, J. Scott, [N. S.], 830.)

Sec. 890. REVOCATION OF GUARANTY ON DEATH OF GUARANTOR, AND BY NOTICE.—Unless the obligation of the surety is a bare authority, and not a contract it will not be revoked by his death. It is a valid obligation against the estate of the surety the same as though he were alive. (*Brandt, Sur. & Guar.*, Sec. 134, citing *Hightower v. Moore*, 46 Ala., 387; *Royal Ins. Co. v. Davies*, 40 Ia., 469, Etc.)

But since the surety for the performance of a contract, may, after a default by the principal justifying its determination, demand of the creditor that the contract be terminated, and his suretyship be limited to the damages then sustained (*Hunt v. Roberts*, 45 N. Y., 691), it is sometimes held that the death of the guarantor will operate as notice to the creditor of such termination, or operate to revoke his authority to give further credit on a limited guaranty. (*Harriss v. Fawcett*, L. R. 8 Ch. App. Cas., 866; *Michigan State Bank v. Estate of Leavenworth*, 28 Vt., 209.) And the death of the guarantor will revoke a continuing guaranty as to subsequent advances if the creditor has notice of the death. (*Hyland v. Habich*, 150 Mass., 112.) The creditor or other party secured by a guaranty would have a reasonable time to secure other sureties, after receiving notice that the surety desired to be discharged before such notice would

take effect. (*Bostwick v. Van Voorhis*, 91 N. Y., 353.)

Sec. 891. WHEN THE SURETY MAY BE SUED JOINTLY WITH THE PRINCIPAL.—If the principal and surety are jointly liable on the same contract, they may be sued jointly, though the fact of the one being a surety appears on the instrument, as where a note reads "I promise" and is signed by the principal and another who adds "surety" to his name. (*Dart v. Sherwood*, 7 Wis., 523; *Craddock v. Armor*, 10 Watts, 258.) Where the wording of the surety's promise shows that his liability is distinct from and collateral to that of the principal, as where the words are "in case of non-payment," or "not being fulfilled" on the part of the principal, the surety cannot be sued jointly with the principal. (*Cross v. Ballard*, 46 Vt., 415; *Virden v. Ellsworth*, 15 Ind., 144.)

Sec. 892. SURETY NOT LIABLE AT LAW, MAY OR MAY NOT BE CHARGEABLE IN EQUITY.—A court of equity will charge a surety in many cases where he is not liable at law, as by allowing a lost bond to be set up (*Kerney v. Kerney*, 6 Leigh, Va., 478), reform a bond so as to correspond with the facts, intention or purpose for which it was given. (*Olmsted v. Olmsted*, 38 Conn., 309; *Percival v. McCoy*, 13 Fed. Rep., 379.) At law there is no remedy against the estate of a deceased surety in a joint obligation, and, in gen-

eral, equity will not charge the estate of such surety, unless there is some previous equity, or all the obligors partook of the consideration, and it would appear that the intention had been to make a joint and several note instead of a joint one.*

Where the surety or guarantor in a joint obligation is directly benefited by the contract, his estate will be held liable on the promise. (*Richardson v. Draper*, 87 N. Y., 337.) And the surety may expressly bind his estate so that it will be liable, and the State statutes providing that all causes of action founded on contract survive, will hold the estate of surety on a joint promissory note. (*Redman v. Marvil*, 73 Ind., 593.)

Sec. 893. CONTRACT OF SURETY GOVERNED BY LAW OF PLACE WHERE MADE.

—The general rule is that the liability of the surety or guarantor is construed according to the law of the place of making the contract. (*Long v. Templeman*, 24 La. Ann., 564.) The intention of the parties may change this rule, and make the contract subject to the laws of a state other than the one where executed. (*Milliken v. Pratt*, 125 Mass., 374.)

*Brandt, Sur. & Guar., Sec. 139; *Pickersgill v. Lahnes*, 15 Wall., 140. "Where a joint appeal bond is signed by two sureties, and one of them dies, his estate is discharged from liability, both at law and in equity, and the fact that the bond was given in pursuance of a statute does not affect the liability thereunder." (Brandt, Sec. 139, citing *Wood v. Fisk*, 63 N. Y., 245.)

Sec. 894. LIABILITY OF SURETY WHEN PRINCIPAL DISCHARGED OR NOT ORIGINALLY BOUND.—As a general rule the surety is not bound where the principal for some reason is not bound by the contract on which the surety has promised, since the surety's contract is collateral or accessory to that of the principal, and the principal being discharged the surety is also. (*Ferry v. Burchard*, 21 Conn., 597.) But there are cases when the surety cannot take advantage of the release of the principal. A distinction is drawn as regards the reasons which discharge the principal, if they effect the debt or contract itself, as fraud, violence, or other reason avoiding the obligation the surety is discharged with the principal, but if they are personal to the principal, as insolvency, minority, and the like, the surety will not be released. (*Baldwin v. Gordon*, 12 Martin [La.], O. S., 378.) A release of the principal by the creditor without reservation will release the surety, since he has no right of action against such released principal. (*Trotter v. Strong*, 63 Ill., 272.) But the creditor may reserve his rights against the surety and release the principal, and yet hold the surety. (*Green v. Wynn*, L. R. 4, Ch. App. Cas., 204.) And where the surety is fully indemnified he will not be discharged by the creditor releasing the principal. (*Moore v. Paine*, 12 Wend., 123.) The discharge of the principal by act of law, as under a bankrupt or insolvency law, will not discharge the surety. (*Cowper v. Smith*, 4 M. & W., 519; *Wolf v. Stix*, 99 U. S., 1;

Lackey v. Steere, 121 Ill., 598.) The authorities are divided as to the liability of the surety where the principal, who is named in the instrument, does not sign it at all. In a number of cases it is held that the surety is not liable, and in others he is held not to be released by such failure to sign.*

A surety for an infant or married woman is, in general, bound though such principal set up his or her disability and be discharged. The courts holding that the incapacity of the principal might be the very reason why a surety was required. (Bank v. Dillon, 30 Vt., 122; Weed Sewing Machine Co. v. Maxwell, 63 Mo., 486.)

Sec. 895. NECESSITY FOR DEMAND ON PRINCIPAL AND NOTICE OF DEFAULT TO GUARANTOR.—“The authorities are agreed that, where the liability of the guarantor depends upon a contingency, it is necessary that notice of default should be given to the guarantor within a reasonable time after demand; and demand should be made of the principal at or very soon after maturity. (Clay v. Edgerton, 19 Ohio St., 553; Montgomery v. Kellogg, 43 Miss., 486.)

“But where the guaranty is absolute, the authorities are divided, some holding that the guarantor's

*Bean v. Parker, 17 Mass., 591; People v. Hartley, 21 Cal., 585; Johnston v. Kimball Twp., 39 Mich., 187; State v. Austin, 35 Minn., 51, hold that the surety will not be bound, while the following hold the contrary: State v. Bowman, 10 Ohio, 445; State v. Peyton, 32 Mo. App., 522; Cahill's Appeal, 48 Mich., 616; Trustees of Schools v. Sheik, 119 Ill., 579; McIntosh v. Hurst, 6 Mont., 287.

liability becomes absolute at maturity, without any demand on the principal or notice of default to himself (*Brown v. Curtis*, 2 N. Y., 228; *Voltz v. Harris*, 40 Ill., 159), and others, claiming that in order to make sure of the liability of the guarantor in any case, demand must be made of the principal, and notice of default sent to the guarantor, within a reasonable time after maturity."*

Where principal is insolvent when the debt becomes due no notice of his default need be given the guarantor. (*Wolfe v. Brown*, 5 Ohio St., 304.) So, where the guarantor's promise is unconditional, and made after the debt was due from the principal, no notice of demand on principal and default need be given to hold the guarantor. (*Munro v. Hill*, 25 S. C., 476; *Read v. Cutts*, 7 Greenl., Me., 186.) The guarantor may waive demand and notice of default, and a subsequent promise to pay the debt made by the guarantor will be treated as a waiver of demand and notice. (*Wadsworth v. Allen*, 8 Gratt.,

*Tiedeman, Com. Pap., Sec. 421; *Douglass v. Reynolds*, 7 Pet., 126; *Second Nat. Bank v. Gaylord*, 34 Ia., 248; *Newton Wagon Co. v. Diers*, 10 Neb., 285. "But this requirement of demand and notice is never considered an absolute condition precedent to the liability of the guarantor. The guarantor is discharged from liability, on account of the failure of demand and notice, only when such failure results in some loss or damage to the guarantor, which he could have avoided, had he received notice of the principal's default within a reasonable time after maturity. If he has sustained no loss, he is liable, notwithstanding the failure of demand and notice. For example the guarantor is liable, notwithstanding the want of notice, if the principal was insolvent at and before maturity of the paper, because the law presumes that the guarantor suffers nothing in such case." (Tiedeman, Com. Pap., Sec. 421.)

174; *Reynolds v. Douglass*, 12 Pet., 523.) But where the advances are made to the principal on a letter of credit given by the guarantor, by the weight of authority, demand of payment must be made on the principal, and notice of default given to the guarantor, unless the principal be insolvent at the date of maturity. (*Douglas v. Reynolds*, 7 Pet., 113.)

Notice of default, when necessary to be given, should be given within a reasonable time, and this depends upon the circumstances of each case. The question what constitutes reasonable time would be a question for the jury under instruction from the court. (*Brandt, Sur. & Guar.*, Sec. 203; *Lowry v. Adams*, 22 Vt., 160.) Proof that notice was given may be inferred from circumstances, and any notice coming to the guarantor, whether from the creditor or not, will be sufficient to charge him. (*Griffin v. Rewbert*, 2 Rich. Law, N. S., 410; *Oaks v. Weller*, 16 Vt., 63.) The notice need not be in writing or any particular form, unless specified in the contract. (*Lee v. Briggs*, 39 Mich., 592; *Brandt, Sur. & Guar.*, Sec. 204.)

Sec. 896. LIABILITY OF BLANK INDORSERS AND ACCOMMODATION PARTIES TO COMMERCIAL PAPER.—Accommodation parties, as a rule, unless they have indicated the fact of their suretyship in signing, will assume the same liabilities, and are in general, entitled to the same rights of demand and notice of non-payment.

except the principal, as if their apparent character of drawer, drawee, payee and indorser was real.*

"There is another class of indorsers not in general subject, like those above mentioned, to the law relating to commercial paper. Thus: A executes his note payable to B or order, or to B alone, and then, before its negotiation by B, X, in no way apparently connected with the note as holder or transferor, indorses his name in blank on the note, and then B or his assignee, sues upon it. The question arises, when and for what purpose did X do this? Such an outside blank indorsement on a bill or note does not come within the law relating to indorsers of commercial paper, and is open, in general, to construction to the intent and liability of X, and to parol evidence to show the relation of X to the transaction." (Swan's Treatise, p. 579.)**

*Swan's Treatise, 15th ed., p. 578: "Even an accommodation drawer is entitled to notice of demand and non-payment if he had reason to expect his principal would provide funds to meet the bill; and the accommodation indorsers and parties to such bill of exchange are liable to the holder and each other separately, and in the order in which they have become apparently parties to the bill." Id.: As between themselves they may show their intention to be liable as co-sureties. And such accommodation indorsers on a promissory note are *prima facie* co-sureties. (Williams v. Blossom, 11 Ohio, 62; Douglas v. Waddle, 1 Ohio, 413.)

**"The English rule is that where one who appears as a principal party is a surety for another, who appears to be a secondary party, drawer or indorser, this fact may be shown by parol evidence, and the party who is in fact a surety will be entitled to all the rights and privileges of a surety, as against any holder who knew the fact. This is the equitable rule, enforced in all English courts, in which equitable pleas are admissible; but, according to the common law rule as laid down by Lord Mansfield, the parties to commercial paper sus-

"It is, however," says Mr. Brandt, "well settled that the agreement upon which the blank indorser of another's obligation signed, and the liability which he intended to assume, may (at least between the original parties, or those parties and a holder with notice), be shown by parol evidence, and he will be held only according to such agreement and intention." (Sur. & Guar., Sec. 182, citing *Sanford v. Norton*, 14 Vt., 228; *Chandler v. Westfall*, 30 Tex., 475, etc.)

OF THE DISCHARGE OF THE SURETY OR GUARANTOR.

Sec. 897. WAYS IN WHICH SURETY OR GUARANTOR MAY BE DISCHARGED. — In general, the surety or guarantor may be discharged by payment of the obligation for which he is liable; by the creditor giving an extension of time to the principal; by the alteration, without his consent, of his contract; by the fraud, concealment and the like

tain the liabilities and enjoy the privileges and rights, which are incident to their ostensible characters, and no others. According to this rule it is not permissible to show by parol evidence that the drawer or indorser is the principal debtor, and that the maker or acceptor is the accommodation party or surety, in order to bind the subsequent holder, who knew the fact. In the United States a few highly respectable authorities have adopted the English equitable rule. (*Guild v. Butler*, 127 Mass., 386.) But the weight of authority in this country favors the English common law rule. (*Gano v. Heath*, 36 Mich., 441; *Summerhill v. Tapp*, 52 Ala., 227.) The principal reason for holding to the common law rule is, that the party who is ostensibly the primary debtor can always protect himself against any act of indulgence to the ostensibly secondary, but actually primary obligor, by paying the debt himself, and recovering the sum so paid of the real primary debtor." (*Tiedeman*, Com. Pap., Sec. 422.)

acts on the part of the creditor; and by the creditor releasing, or negligently losing security for the debt. Each of these forms of discharges will be briefly discussed in their order.

Sec. 898. DISCHARGE OF SURETY OR GUARANTOR BY PAYMENT.—In general the liability of the surety or guarantor ceases when the debt of the principal is paid. (Petefish, Skiles & Co. v. Watkins, 124 Ill., 384.) But where a payment is made by the principal and accepted by creditor and afterwards, without fault of the creditor, such payment is set aside, as a fraudulent preference, the surety will not be discharged. (Watson v. Poague, 42 Ia., 482.) When payments are made by the principal on his general indebtedness to the creditor, the rule as to their application is practically the same as that given in a previous section as to payments on notes. (Ante., Sec. 832.) When the debt is once paid it cannot be revived by an agreement between principal and creditor otherwise applying the sum, so as to bind the surety. (Gibson v. Rix, 32 Vt., 824.) And if funds have been appropriated by the principal to the payment of the debt, they cannot be diverted to the payment of any other debt of the principal without the consent of the surety. (Mellendy v. Austin, 69 Ill., 15.) The creditor holding security is regarded as a trustee for the purpose of its distribution, and must apply it according to the trust. (Hidden v. Bishop, 5 R. I., 29.) And it held that the surety is

discharged by payment on behalf of the principal, regardless of the source of the money, and another advancing it to the principal cannot hold the surety. (*Felch v. Lee*, 15 Wis., 265.)

A valid tender of the money due on the debt by the principal, after the debt is due, if not accepted by the creditor, will discharge the surety. Otherwise, the courts say, the creditor would have the power to keep the surety under the cloud of the debt any length of time. (*Johnson v. Ivey*, 4 Cold. [Tenn.], 608; *Spurgeon v. Smitha*, 114 Ind., 453.) So where the creditor accepts part payment from the principal in full satisfaction of the debt the surety is discharged. (*Heitz v. Atlee*, 67 Ia., 483.)

Sec. 899. DISCHARGE OF SURETY OR GUARANTOR BY GIVING TIME.—The surety or guarantor obligated to pay the debt of another will be discharged if the creditor, without the consent of the surety or guarantor, by an agreement upon sufficient consideration, with the principal, extend the time of payment or performance for a definite time; and this whether the extension is given before or after the debt is due, or after judgment taken upon it.

1. The Consideration.—The agreement for an extension of time between principal and creditor to operate as a discharge must be founded upon a sufficient consideration the same as any simple contract. Without a consideration the contract is not binding and the surety not precluded from proceed-

ing against the principal. (Ford v. Beard, 31 Mo., 459; Zane v. Kennedy, 73 Pa. St., 182.) A mere voluntary or passive delay by the creditor, however long continued, will not release the surety. (Whiting v. Clark, 17 Cal., 407.) And it is held that the payment of interest when due, or part payment of the debt when due, will not be a sufficient consideration to support the contract for an extension of time as such payments are due to the creditor anyway. (Roberts v. Stewart, 31 Miss., 664; Johnston v. Thompson, 4 Watts, 446.) But the payment of interest in advance, or the payment of any part of the debt before due, will be a sufficient consideration, as this is an advantage to the creditor. (Uhler v. Applegate, 26 Pa. St., 140; Mayer v. Lanfrom, 86 Ill., 513.) And in the case of interest being paid in advance it is held in many cases that such payment operates as a *prima facie* agreement to extend the time of payment of the debt for the period for which interest was paid, without further evidence. (Woodburn v. Carter, 50 Ind., 376; Crosby v. Wyatt, 10 N. H., 318; Contra Hosea v. Rowley, 57 Mo., 357.) The agreement to pay interest for the period of the extension is sometimes held to be a sufficient consideration, though at no higher rate than the obligation previously drew. (McComb v. Kittridge, 14 Ohio, 348.) It being considered a valuable right to have money placed at interest. The payment of an increased rate of interest is sufficient. (Huff. v. Cole, 45 Ind., 300.) The payment of usurious interest is held to be a sufficient

consideration for an extension. (*Turrill v. Boynton*, 23 Vt., 142.) But the agreement to pay usurious interest is not sufficient, since it is void. (*Hunt v. Postlewait*, 28 Ia., 427.) And where the statute of the State declared all contracts infected with usury void, the actual payment of usury was held not to be sufficient consideration to support an agreement for an extension of time so as to discharge the surety. (*Vilas v. Jones*, 1 N. Y., 274; *Irvine v. Adams*, 48 Wis., 468.)

2. For a Definite Time.—The extension of time must be definite, otherwise the hands of the creditor are not tied, the contract being void for uncertainty. When the extension relied on was to wait "awhile longer," it was held void for uncertainty and the surety not released. (*Jenkins v. Clarkson*, 7 Ohio, 72.) But an extension of time "to the summer" or "to the fall" was held sufficiently certain and definite. (*Abel v. Alexander*, 45 Ind., 523.) But an extension of the time of payment until "some time in the summer" was held too indefinite. (*Miller v. Stein*, 2 Pa. St., 286.) The surety may consent to an extension of the time of payment, and in such case will not be discharged. (*Treat v. Smith*, 54 Me., 112.) And the surety after having been discharged by the giving of time to the principal, may bind himself by a new promise to pay the debt. If he knows the facts of his discharge by the giving of time no new consideration need appear for the promise, but it must be upon consideration if he does not know of his discharge. (N. H.

Savings Bank v. Colcord, 15 N. H., 119; Williams v. Boyd, 75 Ind., 286; Bramble v. Ward, 40 Ohio St., 267.)

Sec. 900. SAME SUBJECT—EXCEPTIONS AND OTHER PRINCIPLES.—To the rule that the surety will be discharged by giving time to the principal several exceptions exist: Thus where the surety is fully indemnified by property of the principal put under his control to meet his obligation, such surety will not be discharged by an extension of time granted to the principal by the creditor. (Kleinhaus v. Henerous, 25 O. St., 667.) The surety is regarded as the principal, or as holding property appropriated to the payment of the debt of the principal. (Smith v. Steele, 25 Vt., 427.) So the giving of time to the surety by an agreement between creditor and principal, as by the creditor agreeing that he shall not be sued for a stated time after the debt is due, does not affect the liabilities of the surety or principal. (Emery v. Richardson, 61 Me., 99.) But a solidary co-surety would be discharged from one-half the debt by giving time to the other. (Gosserand v. Lacour, 8 La. Ann., 75.) The agreement to give time may be express or implied if carried out according to its terms. (Osborn v. Low, 40 Ohio. St., 347.)

The surety is discharged though the agreement for an extension of time is not made until after the debt is due; (Wheaton v. Wheeler, 27 Minn., 464), or after judgment taken. (Pilgrim v. Dykes, 24 Tex., 383.)

The taking of a new note from the principal by the creditor which note falls due on a later date than the original obligation signed by the surety, will discharge the surety, as it amounts to an extension of time. (Chicasaw Co. v. Pitcher, 36 Ia., 593.) Otherwise where the new note falls due before the original. (Robinson v. Dale, 38 Wis., 330.)

The taking of collateral security, as a trust deed or mortgage security, will not, in general, discharge the surety, though it matures after the time of payment of the debt, if it does not amount to an extension of the time of payment. (Burke v. Crueger, 8 Tex., 66; German Ins. Co. v. Vahle, 28 Ill. App., 557.) But this rule is only *prima facie* and gives place to an express agreement for an extension of time on taking such security. The agreement for extension of time in order to work a discharge of the surety must be made by the creditor or his lawfully authorized agent. And where the creditor reserves remedies against the surety in giving time to the principal the surety is not discharged. (Morse v. Huntington, 40 Vt., 488.)

When the surety pleads an extension of time by the creditor as a discharge, he must set up the facts of the case and not a mere conclusion of law. (Tracy v. Quillen, 65 Ind., 249.)

Sec. 901. DISCHARGE OF SURETY OR GUARANTOR BY ALTERATION OF THE CONTRACT.—The giving of time by the creditor to the principal is an alteration of the surety's con-

tract and is the chief reason of his being discharged. (Lane & Saylor v. Scott & Culver, 57 Tex., 367.) Other alterations by the parties to the contract, of its terms, will, in like manner, discharge the surety. (Hobbs v. Rue, 4 Pa. St., 348.) Thus, by changing the date of a note without the consent of the surety, the holder will discharge such surety. (Miller v. Gilleland, 19 Pa. St., 119.) So where the principal adds "with interest from date," to a note written without interest when signed by the surety, the latter is discharged. (Kountz v. Hart, 17 Ind., 329.) The addition of a new party to a note after the execution and delivery by the surety, without his consent, though a benefit to such surety, will discharge him. (Bank v. Penick, 2 T. B. Monr. Ky., 98.) Otherwise if the signature of new surety was added before delivery. (Graham v. Rush, 73 Ia., 451.) And, in general, any material or essential feature of the surety's contract altered by a party to the instrument, will work a discharge of the surety.* The surety may ratify the alteration after

* "No principle of law is better settled at this day than that, the undertaking of the surety being one *strictissimi juris*, he cannot, either at law or in equity, be bound farther or otherwise than he is by the very terms of his contract. . . . Neither is it of any consequence that the alteration in the contract is trivial, nor even that it is for the advantage of the surety. . . . *Non haec in fœdera veni* is an answer in the mouth of the surety from which the obligee can never extricate his case, however innocently or by whatever kind intention to all parties he may have been actuated." (Lumpkin, J., in Bethune v. Dozier, 10 Ga., 235.) In Nichols v. Palmer 48 Wis., 110, where a lease with surety thereon was for three years, and by an agreement between lessor and lessee it was changed to two

it is made and will then be bound. (*Pelton v. Prescott*, 13 Ia., 567.)

Where the contract of the surety is for the conduct of the principal in an office or position of trust, and after the surety has become bound a change is made in the duties of such principal, the surety will be discharged. (*Gass v. Stinson*, 2 Sumner, 453; *Miller v. Stewart*, 9 Wheat., 680.) Where the bond of the surety was for the honesty and faithfulness of an assistant book-keeper, and such book-keeper was made to perform the duties of note teller and discount clerk and defaulted in the performance of the latter duties, the surety was held to be discharged. (*Natl. Bank of Baltimore v Gerke*, 68 Md., 449.)

Sec. 902. DISCHARGE OF SURETY OR GUARANTOR BY FRAUD, MISREPRESENTATION, CONCEALMENT, ETC.—The fraud, misrepresentation, or concealment, by the creditor, or by the principal with his knowledge or consent, of material facts which would, if known to the surety, have kept him from signing the contract, or which have the effect of increasing his liability, will discharge the surety from his obligation. (*Monroe v. Anderson Bros.*, 65 Ia., 692; *Putnam v. Schuyler*, 4 Hun., 166.)

Thus a misrepresentation as to the use to which the note signed by the surety was to be put, was

years, the surety was discharged. But where the agreement between lessor and lessee reduced the rent the surety was not discharged. (*Preston v. Huntington*, 67 Mich., 139.)

held to discharge the surety. (Ham v. Greve, 34 Ind., 18.) And if the surety's signature is obtained on condition that another shall also sign as surety, such condition being agreed to or known to the creditor who takes the obligation, if unperformed, it will discharge the surety. (Cowan v. Baird, 77 N. C., 201.) And, in general, where the surety signs upon a condition such condition must be complied with or he will not be bound. (Jones v. Keer, 30 Ga., 93; Brandt, Sur. & Guar., Sec. 403.) This rule is subject to the exception that the fraud or misrepresentation of the principal in inducing the surety to sign will not release such surety, unless the creditor have notice of the fraud or of the condition which has not been fulfilled. (Rothermal v. Hughes, 134 Pa. St., 510; Whitcomb v. Miller, 90 Ind., 384.) It is the misrepresentation of an existing fact, and not of a mere unexecuted intention that will discharge the principal. So where the retiring partner induced the other to assume the debts by representing that he would forever retire from the like business, and did not do so, it was held not to be such a fraud as would discharge the surety. (Gage v. Lewis, 68 Ill., 604.)

The concealment on the part of the obligee which will work a discharge of the surety must be material, that is, a concealment of some fact or circumstance immediately affecting the liability of the surety, and bearing directly upon the particular transaction to which the suretyship attaches. (Brandt, Sur. & Guar., Sec. 419; Comstock v. Gage, 91 Ill., 328.)

Where it is the duty of a person having knowledge of facts to disclose them, concealment or failure to disclose them will be considered fraudulent. Thus it is held that when the obligee knows that the person for whose acts he is taking security is a defaulter it is his duty to inform the surety of the fact. (*Screwmen's Ben. Assoc. v. Smith*, 70 Tex., 168.) A bank taking a bond for the conduct of a person in their employ is bound to disclose the fact if he is known to have made default before, or the surety will be discharged. (*Franklin Bank v. Cooper*, 39 Me., 542; *Third Natl. Bank v. Owen*, 101 Mo., 558.) And likewise where there is a continuing guaranty for the honesty of an employee, who has made a default, he must be dismissed, or the surety's consent secured to his being retained upon full notice of the facts. (*Roberts v. Donovan*, 70 Cal., 108; *estate of Rapp v. The Phoenix Ins. Co.*, 113 Ill., 390; *Dinsmore v. Tidball*, 34 Ohio St., 411.)

Sec. 903. DISCHARGE OF SURETY OR GUARANTOR BY CREDITOR RELINQUISHING SECURITY.—It is an equitable principle arising from the relation of principal and surety, that the property of the principal pledged for the payment of his debt, should be applied to the payment of such debt so as to relieve the surety from liability, and the creditor having property pledged to him by the principal for this purpose by relinquishing his lien upon the pledged property so that it cannot be applied to the payment of the debt will discharge

the surety. (Port v. Robins, 35 Ia., 208.) The creditor holding a lien or pledge of property of the principal is regarded as a trustee of the property, to be applied according to the purpose of the trust, and this is true when the lien is secured after the surety has become bound. And since the surety by paying the debt is subrogated to all the securities which the creditor has at the time for the payment of the debt, the release of any part of such security by the creditor is such a damage to the surety as will work a discharge *pro tanto* of his obligation. (Guild v. Butler, 127 Mass., 386; Cummings v. Little, 45 Me., 183.) The surety may agree to, or request the release and will then be bound; but he is not obliged to object to the release by the creditor if he has knowledge of such party's intention. (Brown v. Abbott, 110 Ill., 162; Polak v. Everett, L. R. 1, Q. B. Div., 669.)

In a case where the contractor of a building gave surety to the owner for the performance of his contract, and the owner was to pay the contract price in various installments, the last being due sixty days after the completion of the work, it was held that such owner having knowledge of mechanics' lien suits being filed and subsequently paying the contractor the sums due on the contract, thereby discharged the surety under the principle stated above. (Taylor v. Jeter, 23 Mo., 244.)

And the creditor by wasting or rendering unavailable the mortgaged security of the principal will thereby discharge the surety. (Phares v. Barbour,

49 Ill., 370.) If the creditor by relinquishing security for the debt materially alters the contract of the surety, such surety is fully discharged. (Polak v. Everett, *supra*; Watts v. Shuttleworth, 7 H. & N., 353.) If the surety's contract is not changed, he is only released to the extent of the security released. (McMullen v. Hinkle, 39 Miss., 142; Brandt, Sur. & Guar., Sec. 429.)

The creditor must have a lien on the property released or such an interest in it as will charge him as trustee if the release is to operate to discharge the surety. And where the release of the property by the creditor in no wise injures the surety or alters his contract, it will not discharge the surety. (Brandt, Sur. & Guar., Secs. 430, 431; Coates v. Coates, 33 Beav., 249.) Where a bank holding a note of principal and surety receives a deposit from the principal, the authorities are divided as to its duty to retain such money and apply it to the payment of the note.*

The release by the creditor of a valid levy, or execution against the property of the principal, by which the surety loses the right to hold the property for the payment of the debt, will discharge the surety to the value of the property levied upon.

*Wilson v. Dawson, 52 Ind., 513, is a case where the money of the principal was deposited on a special agreement, and though sufficient to pay a note with surety then due at the bank, its being paid out according to the agreement by the bank did not discharge the surety. The opposite opinion is maintained in several cases. (McDowell v. Bank, 1 Harr. (Del.), 369.)

(Dixon v. Ewing's Admr., 3 Ohio, 280.) Likewise the release by the creditor of an attachment on property of the principal to the damage of the surety will discharge the surety *pro tanto*, as such attachment is regarded as a lien held by the creditor and must be protected for the benefit of the surety. (City of Maquoketa v. Willey, 35 Ia., 323.) The mere dismissal of a suit by the creditor against the principal in which no attachment or other lien has been secured will not discharge the surety. (Somerville v. Marbury, 7 Gill & Johns [Md.], 275.)

When there are several sureties liable for the same debt, and the creditor releases one of them without materially altering the contract, the others are generally held released only to the extent that such released surety would have been liable to contribute to them. (Jemison v. Governor, 47 Ala., 390; Dodd v. Winn, 27 Mo., 501.)

Sec. 904. SAME SUBJECT—NEGLIGENT LOSS OF COLLATERAL SECURITY.—The creditor being held to be a trustee of the property of the principal in his hands for the benefit of the surety, his negligence or carelessness as regards such property resulting in a loss will discharge the surety to the extent of such loss. The creditor in such cases must use due diligence in preserving such property according to the circumstances of the case. As regards collateral security in the way of claims or obligations against third parties, the creditor is bound to use such diligence and take such steps as

will render them available for the purpose for which they were assigned, and negligence or inaction resulting in a loss will release the surety. (*Crim v. Fleming*, 101 Ind., 154; *Kemmerer v. Wilson*, 31 Pa. St., 110.) Thus where the assignee of a note as collateral security was notified of the impending insolvency of the maker, and warned to sue or surrender the note, and he did not do so, the debt being lost he was held responsible for the amount of the note. (*Bonta v. Curry*, 3 Bush., 678.) And where the creditor had received a mortgage on personal property from the principal to secure a note previously signed by a surety, and negligently let the principal dispose of such mortgaged property he thereby discharged the surety. (*City Bank v. Young*, 43 N. H., 457.) So the creditor who has a lien or security for a debt will discharge the surety by not taking the steps necessary to preserve or perfect such lien on the principal's property, as by neglecting to make the proper parties defendant in case of the death of the principal (*Saulet v. Trepagnier*, 2 La. Ann., 427), or to record a mortgage. (*Burr v. Boyer*, 2 Neb., 265.) But the creditor is not required to present a claim to the personal representatives of a deceased principal, and though the remedy is lost against the estate by such delay, the surety will not be discharged. It being said that the creditor is under no greater obligation to present him claim against the estate than he would have been to sue the principal if still alive. (*Brandt, Sur. & Guar.*, Sec. 448.)

CHAPTER III.

OF THE RIGHTS OF SURETIES AND GUARANTORS— CONTRIBUTION AND SUBROGATION.

Sec. 905. IN GENERAL.—The rights of sureties and guarantors, generally speaking, are the following: 1, the right to indemnity from the principal on payment of the debt or obligation. 2. The rights which they have against the creditor at law and in equity to prevent the creditor from doing acts to their prejudice, and which have been covered in the preceding chapter. 3. Rights against third persons to hold property of the principal to indemnify them against prospective or possible damage. 4. Rights as against each other for contribution between co-sureties. 5. The equitable right to be subrogated to the position and the rights of the creditor upon payment of the principal's debt. This chapter will be devoted to a brief discussion of these rights and the principles governing them.

Sec. 906 THE RIGHT TO INDEMNITY FROM THE PRINCIPAL.—The principal being the real debtor, and the guarantor or surety only being responsible for his default, the law implies a promise on the part of the principal to indemnify the surety, and a right of action immediately

accrues to the surety or guarantor against the principal upon payment of the debt. (Wilson v. Crawford, 47 Ia., 469; Kimmel v. Lowe, 28 Minn., 265.)

The right of action by the guarantor or surety against the principal does not accrue until he pays the debt of the principal. (Cotton v. Alexander, 32 Kans., 339; *In re* Estate of Hill, 67 Cal., 238.) This being so, the surety could not bring an attachment or hold property in his hands not appropriated for the payment of the debt, until he had actually paid the debt. (Dennison v. Soper, 33 Ia., 183; Ingalls v. Dennett, 6 Greenl., Me., 79.) The surety may pay the debt before due and sue the principal for indemnity after it has become due. (White v. Miller, 47 Ind., 385.) The action for indemnity should be brought in the name of the surety and not in the name of his obligee. (Hardware Co. v. Deere, Etc., Co., 53 Ark., 140.) No demand or notice need be made or given to the principal by the surety who has paid the debt before suit is brought for indemnity. The contract of indemnity is said to arise at the moment when the surety contracts his obligation, and is broken the moment the surety is damnified (Ward v. Henry, 5 Conn., 595; Brandt, Sur. & Guar., Sec. 210.)

The surety need not pay the debt of the principal in cash, but any form of payment accepted by the creditor will answer to support his right to sue the principal for indemnity. Thus the surety may pay with his note, by the delivery of property, or a

mortgage thereon to the creditor will constitute a payment. (*Sapp v. Aiken*, 68 Ia., 699; *Peters v. Barnhill*, 1 Hill, Law, 237; *McVicar v. Royce*, 17 Up. Can. [Q. B.], 529.) A few cases hold that the note would have to be paid before the surety could sue the principal for indemnity. (*Stone v. Hammell*, 83 Cal., 547.)

But where the surety gets a compromise from the creditor and extinguishes the debt for less than its full amount, he cannot recover from the principal more than the amount of the settlement with interest and costs. (*Coggeshall v. Ruggles*, 62 Ill., 401; *Hicks v. Bailey*, 16 Tex., 229; *Feamster v. Withrow*, 12 W. Va., 611.) To recover costs made, the surety must have had reason for making them. (*Carpenter v. Minter*, 72 Tex., 370.) So the surety cannot recover indirect or consequential damages for his loss by reason of having to pay the debt of the principal, or for sacrificing his property, or for being imprisoned, but simply the amount actually paid out with necessary costs. (*Powell v. Smith*, 8 Johns., 249; *Vance v. Lancaster*, 3 Haywood [Tenn.], 130.) But by agreement with the principal he may recover a stipulated sum for the use of his credit. (*Perrine v. Hotchkiss*, 58 Barb., 77.)

Sec. 907. SAME SUBJECT—OTHER PRINCIPLES.—The surety may pay a part of the debt when due, or pay it in installments, and recover after each payment a like sum from the principal. (*Davies v. Humphreys*, 6 M. & W., 153.) As

regards the principal's right to exemption or the claim of third parties to the principal's property, the surety's right to indemnity relates back to the time when he signed the contract and became surety, and his equity against the principal's property will be protected from damage by the claims of subsequent creditors. (Barney v. Grover, 28 Vt., 391; Rice v. Southgate, 16 Gray, 142.) The surety's action against the principal is generally that of *assumpsit*, and if there are two or more principals, unless stipulated to the contrary, the surety may sue all of them, or any one of them for indemnity. (Hulett v. Soullard, 26 Vt., 295; Babcock v. Hubbard, 2 Conn., 536.) Where one of several joint guarantors pays the debt he may maintain an action against the principal. (Lowry v. Lumberman's Bank, 2 Watts & Serg., 210.) A payment made by several co-sureties from their individual money, cannot be recovered by them in a joint suit against the principal. (Sevier v. Roddie, 51 Mo., 580.) But if such payment is made from a joint fund, as where the sureties borrow the money on a joint note, they may join in the suit for indemnity. (Pearson v. Parker, 3 N. H., 366.)

A mere volunteer, who has become surety without the request of the principal express or implied, cannot compel indemnity from the principal upon payment of the debt. (Carter v. Black, 4 Dev. & Bat., [N. C.], 425.)

A surety who pays the debt of the principal may recover the same though the principal has been dis-

charged in bankruptcy or under an insolvent act, unless such act expressly includes a provision for the adjustment of claims of sureties liable at the time of the discharge. (*Cake v. Lewis*, 8 Pa. St., 493; *Lipscomb v. Grace*, 26 Ark., 231.) But a discharge of the principal after the debt has been paid by the surety will bar the claim of the surety for indemnity. (*Smith v. Kinney*, 6 Neb., 447.)

The surety may without paying the debt, and even before called upon to pay by the creditor, file a bill in equity praying that the principal be compelled to pay the debt. (*Phila. & Reading R. R. Co. v. Little*, 41 N. J. Eq., 519.) And where the contract of surety with the principal expressly provides that the surety shall be saved harmless from liability as well as indemnified, he may maintain an action at law against the principal without paying the debt. (*Belloni v. Freeborn*, 63 N. Y., 383.) In equity the surety may foreclose a mortgage on the property of the principal before paying the debt from his own money. (*Kramer v. Farmers' Mechanics Bank*, 15 Ohio, 253.)

The surety must take care that the principal is liable for the debt he pays, or he cannot recover indemnity. (*Hollinsbee v. Ritchey*, 49 Ind., 261.) The claim to indemnity being valid, the surety may set-off such claim against a demand which the administrator of the insolvent estate of the deceased principal may have against him. (*Beaver v. Beaver*, 23 Pa. St., 167.) And the surety may purchase property of the principal sold on execution by

reason of a joint judgment against him and the principal. (*Carlos v. Ansley*, 8 Ala., 900.)

The claim of the surety for indemnity against the principal may be barred by the statute of limitations. The statute is held generally to begin to run from the time of the payment of the debt by the surety and not from the time that the debt becomes due. (*Thayer v. Daniels*, 110 Mass., 345) But where the creditor has a judgment against the principal, which is assigned to the surety on payment of the debt, the surety may recover indemnity for the payment of the judgment though the recovery on the original debt would have been barred by the statute of limitations. (*Morrison v. Page*, 9 Dana [Ky.], 428.)

Sec. 908. RIGHTS OF THE SURETY OR GUARANTOR AGAINST THE CREDITOR.—This topic would include the different acts of the creditor which prejudice the surety and operate to discharge him, as giving time to the principal, and the like, which were discussed in the preceding chapter. In addition to these rights of the surety, by the weight of authority it is held that the surety may set-off a debt due by the creditor to the principal when sued by the creditor on the suretyship obligation. (*Andrews v. Varrell*, 46 N. H., 17; *Hollister v. Davis*, 54 Pa. St., 508; *Coffin v. McLean*, 80 N. Y., 560.) The contrary of this rule is held in a number of cases. (*Gillespie v. Torrance*, 25 N. Y., 306; *Thalheimer v. Crow*, 13 Col., 397.)

In some States, as Ohio, it is provided by statute that the surety may compel the creditor to proceed against the principal on notice to him, after the debt is due. There is also a number of authorities holding the surety may, in the absence of a statutory provision, by verbal or written notice to the creditor demand that he sue the principal, and if this is not done, and the principal becomes insolvent thereafter, the surety will be discharged. (*King v. Baldwin*, 17 Johns, 384; *Colgrove v. Tallman*, 67 N. Y., 95.) But the great majority of cases hold that the creditor need not comply with such notice from the surety in the absence of a statute providing for it. (*Jenkins v. Clarkson*, 7 Ohio, 72; *Halstead v. Brown*, 17 Ind., 202; *Inkster v. Natl. Bank*, 30 Mich., 143; *Dane v. Corduan*, 24 Cal., 157.)

Sec. 909. RIGHTS OF SURETY OR GUARANTOR AGAINST THIRD PERSONS.—As against third persons the surety has a right to hold property of the principal mortgaged to him for his indemnity before the debt is due or paid, or take a conveyance of property from the principal on agreeing to pay the debt. (*McWhorter v. Wright*, 5 Ga., 555; *Bellume v. Wallace*, 2 Rich. Law [S. C.], 80.) A judgment lien of the surety against the principal obtained before paying the debt is valid against the claims of creditors of the principal. (*Miller v. Howry*, 3 Pen. & Watts, 327.)

Sec. 910. OF THE RIGHT TO CONTRIBUTION.—Where there are two or more sureties

equally liable for the debt of the principal, and one of them pays the debt, he may compel "contribution," or a payment of their just share from each of the other sureties who are equally liable, called co-sureties. The creditor is not bound to look to all the sureties jointly, but may compel payment from any one, and his election to do so gives rise to the principle of contribution.*

The surety to enforce contribution from the co-sureties, must have paid the debt, but he need not wait until judgment has been taken against him before paying. (*Backus v. Coyne*, 45 Mich., 584; *Bright v. Lennon*, 83 N. C., 183.)

Sec. 911. SAME SUBJECT—WHO ARE CO-SURETIES.—Where all of the sureties sign the same instrument and become equally liable thereon, there is no question of their being co-sureties. But there may be two or more sureties for the same

*"Natural justice says that one surety, having become so with other sureties, shall not have the whole debt thrown upon him by the choice of the creditor, in not resorting to remedies in his power, without having contribution from those who entered into the obligation equally with him. The obligation of co-sureties to contribute to each other is not founded in contract between them, but stood upon a principle of equity until that principle of equity had been so long and so generally acknowledged and enforced, that persons in placing themselves under circumstances to which it applies may be supposed to act under the dominion of contract, implied from the universality of that principle. For a great length of time equity exercised its jurisdiction exclusively and individually; the jurisdiction assumed by courts of law is comparatively of very modern date." (*Bibb, C. J.*, in *Lansdale v. Cox*, 7 T. B. Monr., 401. See also: *Van Winkle v. Johnson*, 11 Oreg., 469; *Jeffries v. Ferguson*, 87 Mo., 244.)

principal who are not co-sureties. If several persons become bound for the same duty or obligation of the same principal, though at different times, by different instruments and without the knowledge of each other, yet they are generally considered as co-sureties. (Woodworth v. Bowes, 5 Ind., 276; Deering v. Earl of Winchelsea, 2 Bos. & Pul., 270; Pickens v. Miller, 83 N. C., 543.) In the last case an administrator who had given bond when first appointed, eight years afterwards gave an additional bond with other sureties, and both sets of sureties were held to be co-sureties. But where an officer held over his term and gave bond for the full term, and then being re-elected gave bond for the expiration of the term with new sureties, the sureties on the different bonds were held not to be co-sureties. (Boone Co. v. Jones, 58 Ia., 373.) And where a person signing a note after the principal and surety had signed, added to his signature, "security for the above parties," he was held not to be a co-surety, since he had qualified his contract so as to become a surety for the whole, after the other two. (Harris v. Warner, 13 Wend., 400.) So, by the weight of authority, successive accommodation indorsers of negotiable instruments are not co-sureties, in the absence of an agreement to that effect. (Brandt, Sur. & Guar., Sec. 260; Hillegas v. Stephenson, 75 Mo., 118; McGurk v. Huggett, 56 Mich., 187.) Parol evidence may be introduced to show that the indorser of a promissory note is a co-surety with the surety signing with the maker. (Nurre v. Chit-

tenden, 56 Ind., 462.) And it is a general rule that parol evidence will be admitted to show the real relation subsisting between several parties bound for the performance of a written obligation. And a parol agreement of one surety to indemnify the other may be shown to defeat the right to contribution. (Brandt, Sur. & Guar., Sec. 261; Craythorne v. Swinburne, 14 Ves., 160.)

When legal proceedings have been commenced against the principal for the collection of the debt, and a new surety becomes bound at such time for the payment of the debt, he is not regarded as a co-surety, but as a surety for the principal from whom the original surety may collect the debt after payment on default of the principal. (Friberg v. Donovan, 23 Ill. App., 58.)

Where one of the sureties has done something that would make it inequitable for him to recover contribution from the other surety, contribution will not be enforced, since it is an equitable right in its foundation, and he who would have equity must do what equity demands. (Dennis v. Gillespie, 24 Miss., 581.) Where one of the sureties by stifling competition bought the land of the principal for less than it was worth, and on payment of the debt, he was held not entitled to contribution from the co-surety. So the surety who becomes so at the request of another upon promise of indemnity, is not a co-surety from whom contribution can be enforced. (Turner v. Davies, 3 Esp., 478.) Likewise the surety of a surety is not a co-surety, and is

not generally liable to contribution. (Adams v. Flannagan, 36 Vt., 400.)

Sec. 912. SAME SUBJECT—OTHER PRINCIPLES CONCERNING CONTRIBUTION.—

When one of several co-sureties afterwards becomes the principal by assignment, with the knowledge and consent of the other sureties, he is no longer a co-surety, but liable for the whole debt to a co-surety who has been compelled to pay it. (Gray v. McDonald, 19 Wis., 213.)

In the case of a co-surety, as in the case of an individual surety, care must be taken on paying the debt to see that the principal and the other sureties are liable, for if they are not contribution cannot be recovered. (Russell v. Faylor, 1 Ohio St., 327.) Indemnity from the principal secured by one co-surety after all signed and before the debt has been paid, and without any previous agreement for indemnity, inures to the benefit of all the sureties, and the holder is a trustee for all. (Seibert v. Thompson, 8 Kans., 65; McCune v. Belt, 45 Mo., 174.) Such a surety on paying the debt out of the indemnity fund, could recover from the co-surety one-half the amount remaining after exhausting the fund. (Currier v. Fellows, 27 N. H., 366.) The surety with indemnity must not release his lien or negligently lose it, or he will thereby discharge his co-surety to the extent that he is injured. (Ramsey v. Lewis, 30 Barb., 403; Carpenter v. Kelly, 9 Ohio, 106.) If a co-surety obtain indemnity from

the principal after the debt has been paid by the co-sureties in equal proportion, it is for his individual benefit, since the payment by each of his proportion annulled the equitable right to contribution, and each became a separate creditor of the principal. (Harrison v. Phillips, 46 Mo., 520.)

Sec. 913. SAME SUBJECT—OTHER EQUITABLE RIGHTS AGAINST CO-SURETIES.—A surety who is called upon to pay the debt may before paying file a bill in equity to compel his co-surety to contribute to the payment, and also in a proper case restrain such co-surety from disposing of his property until the joint obligation was discharged. (Brandt, Sur. & Guar., Sec. 275.)

Where one of two co-sureties consents to give time to the principal, and the other does not, and the one consenting afterwards has to pay the debt, he cannot enforce contribution, since he is regarded as standing in the shoes of the creditor and affected in the same way by giving time to the principal. (Cameron v. Boulton, 9 Up. Can. [C. P.], 537.) Costs and expenses may be recovered in an action for contribution, where they were made in the interests of, or by the common neglect of, the several sureties. (Davis v. Emerson, 17 Me., 64; Fletcher v. Jackson, 23 Vt., 581.)

The proportion which the co-surety may recover from each of the others in an action for contribution, is a *pro rata* amount of the sum paid by him ascertained by dividing the whole amount by the

number of solvent co-sureties. (*Burroughs v. Lott*, 19 Cal., 125.) This is the equitable rule. At law, as a general rule, the surety can recover from the solvent co-sureties only their proportionate share ascertained by dividing the whole sum paid by the whole number of sureties, regardless of those who are insolvent. (*Acers v. Curtis*, 68 Tex., 423.) Where the co-sureties are bound in different amounts for the same obligation, as where one is bound for \$2,000 and another for \$18,000, and a default is made for \$2,000, they are liable in proportion to the amount of the obligation signed by them, and the one liable for \$2,000 can recover eight-ninths of the amount from the other. (*Armitage v. Pulver*, 37 N. Y., 494.)

The suit for contribution may be brought at law or in equity. (*Broughton v. Wimberly*, 65 Ala., 549.) Where two or more co-sureties jointly pay the debt, they may join in a suit for contribution, but if each pays separately they cannot join in such action. (*Dussol v. Brugniere*, 50 Cal., 456; *Lombard v. Cobb*, 14 Me., 222.) When each pays separately they have separate actions against the co-surety for indemnity. (*Atkinson v. Steward*, 2 B. Monr., 348.) Since the insolvent co-sureties are not considered when contribution is asked in an equity court, they are not considered necessary parties, neither is the insolvent principal nor the representatives of insolvent deceased co-sureties necessary parties. (*Brandt, Sur. & Guar., Sec. 292.*)

Sec. 914. SUBROGATION · AN EQUITABLE RIGHT.—“The right of the surety to demand of the creditor whose debt he has paid, the securities he holds against the principal debtor, and to stand in his shoes, does not depend at all upon any request or contract on the part of the debtor with the surety, but grows rather out of the relations existing between the surety and the creditor, and is founded not upon any contract, express or implied, but springs from the most obvious principles of natural justice.”*

Subrogation, by which is meant the right of the surety or guarantor upon payment of the debt of the principal to the creditor, to be substituted for, or placed in the position of the creditor as regards all securities, liens, or other advantages which the creditor is holding against the principal, is strictly an equitable doctrine, and must be enforced in a court of equity. (Smith v. Harrison, 33 Ala., 706.) While a mere stranger or volunteer cannot by the payment of the debt of another be entitled to subrogation, the surety or guarantor of a debt is entitled to subrogation upon payment of the debt without any stipulation for it. (Burton v. Mill, 78 Va., 468; Miller v. Stout, 5 Del. Ch., 259.) The payment by the surety discharges the debt as to the creditor but it remains in force as to such surety against the debtor, and equity by the doctrine of subrogation, aims to compel the party in duty bound to pay the debt to do so, hence it transfers to the surety pay-

*Johnson J., in Mathew v. Aiken, 1 N. Y., 595.

ing, the original evidences of the debt, any judgment in which the debt has been merged, all collateral securities or liens held by the creditor, and a right to compel their assignment to him from the creditor. (*Dunphy v. Gorman*, 29 Ill. App., 132; *McCormick's Admr. v. Irwin*, 35 Pa. St., 111.)

Sec. 915. PREREQUISITES TO THE RIGHT OF SUBROGATION.—All persons who occupy the situation of sureties or guarantors, whether technically called such or not, are, without doing any act signifying their intention to elect or accept the privileges of the right, subrogated to the rights of the creditor against the principal upon payment of the debt. (*Frow, Jacobs & Co.'s Estate*, 73 Pa. St., 459; *Brandt, Sur. & Guar.*, Sec. 299.) If, by laches or delay in asserting the right of subrogation the surety has allowed others to secure *bona fide* claims to the property, he will be held to have lost his right. (*Gring's Appeal*, 89 Pa. St., 336.)

The surety must generally pay the debt of the principal to be entitled to subrogation, but the form of payment is unimportant, and he may pay by note and enforce subrogation though the notes given in payment are not paid. (*Stedman v. Freeman*, 15 Ind., 86.) The surety upon being subrogated to the rights of the creditor stands in his place, and cannot claim any greater rights than the creditor would have had. So the surety may waive his right to subrogation. (*Tyus v. De Jarnette*, 26 Ala., 280.)

The surety being entitled to subrogation to all the securities which the creditor acquires from the principal, a release of such securities by the creditor or their negligent loss by him, will discharge the surety to the extent that such securities would have paid the debt of the principal. (*Nelson v. Munch*, 28 Minn., 314.)

Sec. 916. HOW THE RIGHT TO SUBROGATION ENFORCED.—The surety upon payment of the debt to the creditor, may compel the creditor to assign to him all the securities or obligations of the principal which he may have, if they are not voluntarily given up by the creditor. (*Morgan v. Seymour*, 1 Reports in Ch. 120; *Springer's Admr. v. Springer*, 43 Pa. St., 518.)

Sec. 917. WHEN SUBROGATION WILL BE ALLOWED.—In general, to be entitled to subrogation, the surety must have paid the whole debt, and a part payment will not give him the benefit of subrogation, as this would give separate interest in the same debt to surety and creditor. (*Hollingsworth v. Floyd*, 2 Har. & Gill [Md.], 87.) And subrogation will not be allowed when it would be inequitable, or to the prejudice of a creditor in reference to the debt for which the surety is liable. (*Crumpp v. McMurtry*, 8 Mo., 408; *Henley v. Stemmons*, 4 B. Monr., 131.) Though the debt is paid to the creditor, it is still regarded as subsisting so far as may be necessary to support the assignment

of collateral security held by such creditor to the surety. This is regarded as an imperative exception to the rule that payment discharges a debt as against the co-debtors in order to make subrogation possible and practicable. If the debt was held to be entirely discharged, all the collateral securities held by the creditor would be likewise discharged, and their assignment to the surety would be defeated. (*Edgerly v. Emerson*, 23 N. H., 555.) So for the purpose of obtaining indemnity from the principal, the surety after payment is regarded as at once subrogated to all the rights, remedies and securities of the creditor and entitled to all his liens, priorities and means of payment against the principal. (*Brandt, Sur. & Guar.*, Sec. 304.)

By taking a separate indemnity from the principal for his security with knowledge that the creditor holds a mortgage given by the principal to secure the debt, the surety is held to lose his right to subrogation. (*Cooper v. Jenkins*, 32 Beav., 337.) Other cases hold that the surety may be subrogated to after acquired securities by the creditor though he has taken a separate indemnity. (*Brandt*, Sec. 307.)

A surety who becomes such during the prosecution of a remedy for the debt against the principal is not entitled to subrogation, at least as regards any prior surety, or prior interest in the property which he seeks to reach by subrogation. (*Patterson v. Pope*, 5 Dana [Ky.], 241.)

Subrogation extends to enable the surety paying to enforce the rights of the creditor against a

co-surety. While equity restrains a surety from collecting more from any co-surety than his just proportion, the right of subrogation allows him to collect that much the same as the creditor might do it. (*Lidderdale v. Robinson*, 2 Brock., 159.)

Sec. 918. SAME SUBJECT—IN CASE OF A JUDGMENT.—As regards the right of the surety who pays the debt after the same has been reduced to a judgment to be subrogated to such judgment, there is a conflict among the authorities. If the payment is made with intention of extinguishing the judgment it will of course have that effect and defeat subrogation. But if no such intention appears the better opinion is said to be, that the judgment is discharged as regards the creditor's personal rights thereto, but kept alive as between all parties for the purpose of enforcing the rights of the surety. In the absence of apparent intention in the payment it will be presumed to be the intention of the surety to keep the judgment alive for subrogation thereunder. (*Neilson v. Fry*, 16 Ohio St., 376; *Richter v. Cummings*, 60 Pa. St., 441; *Brandt, Sur. & Guar.*, Sec. 310.) So it is held that if the surety pays the amount of the judgment and takes an assignment of it, he may be subrogated to the rights of the creditor under it, since his intention not to extinguish the judgment is manifested by the assignment. (*Neal v. Nash*, 23 Ohio St., 483; *Thompson v. Palmer*, 3 Rich. Eq., 139.) But there are cases which deny the right of a surety to be

subrogated to a judgment which he has paid for the principal, it being considered as extinguished by such payment, and this has been held in cases where the surety took an assignment of such judgment when paying it. (*Laval v. Rowley*, 17 Ind., 36; *Tiddy v. Harris*, 101 N. C., 589; *Chandler v. Higgins*, 109 Ill., 602.)

So by the weight of authority the surety who pays a specialty debt of the principal, that is, one under seal, is entitled to rank as a specialty creditor being subrogated to the right of the former creditor, unless a contrary intention is manifested at the time of the payment. (*Lumpkin v. Mills*, 4 Ga., 343.)

Sec. 919. EXTENT OF THE RIGHT OF SUBROGATION.—The surety entitled to subrogation is generally entitled to all the securities which the creditor may hold, this is said to be the equitable principle and based on natural justice. "A note, bond, mortgage, pledge and judgment are all equally securities for the debt and collateral to it. If the payment by the surety extinguishes one of them, why does it not extinguish them all? The reasoning which makes a distinction is highly technical and certainly has no foundation in equity." (*Brandt, Sur. & Guar.*, Sec. 314, citing *Gerber v. Sharp*, 72 Ind., 553.) In England, by the Mercantile Law Amendment Act (19 and 20 Victoria, ch. 97, sec 5), parliament has provided that the surety upon payment shall have the right to have assigned to him or a trustee for him, "every

judgment, specialty or other security which shall be held by the creditor," and this whether the judgment is deemed satisfied at law by the payment or not.

The surety is entitled to be subrogated to the rights under a mortgage given by the principal to the creditor in respect to the debt, and may with or without a formal assignment of such mortgage have it foreclosed, in his own name, and apply the proceeds to indemnify himself. (*Gossin v. Brown*, 11 Pa. St., 527; *McLean v. Towle*, 3 Sandf. Ch., 117; *Beaver v. Slanker*, 94 Ill., 175.)

And it is held that a party indemnifying the surety, and who has paid the debt for which the surety was bound, is entitled to subrogation to the same extent as the surety would have been. (*Rittenhouse v. Levering*, 6 Watts & Serg., 190.)

So a third person taking property of the principal charged with the lien of the surety on subrogation will be regarded as a trustee of such property and subject to all the equities which the surety acquires by subrogation, if taken with notice of the facts. (*Drew v. Lockett*, 32 Beav., 499.)

The sureties of officers, administrators, guardians, and the like, are entitled to be subrogated to such rights as the obligee may have against the principal. And the sureties of a guardian may be subrogated to the remedies of the ward against such guardian before judgment and execution against him, if they are legally bound to pay, or where the principal is insolvent before payment. (*Brandt, Sur. & Guar.*, Secs. 317-319; *Fishback v. Weaver*, 34 Ark., 569.)

To be subrogated to the lien of the State or county, where such lien is statutory, the surety must allege and prove their right of subrogation and the extent of it. (*Watts v. Eufaula Natl. Bank*, 76 Ala., 474.) Otherwise the surety is entitled to be subrogated to the rights of the State or county and have them enforced for his benefit as in the case of individual creditors. (*Boltz's Estate*, 133 Pa. St., 77.)

A surety for a part of a debt is not entitled to be subrogated to a security given the creditor by the principal at another time, and for a separate and distinct part of the same debt. (*Wade v. Coope*, 2 Simons, 155.) And it is held that the surety will receive the creditor's right to set aside a fraudulent conveyance by the principal of his property, though such conveyance was made before the surety paid the debt. (*Tatum v. Tatum*, 1 Ired. Eq., 113.)

Sec. 920. WHEN CREDITOR ENTITLED TO SECURITIES HELD BY THE SURETY.—Securities given by the principal to the surety for indemnity against the payment of the debt, are generally subject to the equitable claim of the creditor and may be taken for his indemnity, though they did not influence him in giving credit to the principal, or were not known of by him. (*Kramer & Rahm's Appeal*, 37 Pa. St., 71; *Owens v. Miller*, 29 Md., 144.) The creditor may take such security without having exhausted his remedies at law, or reducing his debt to a judgment. (*Kinsey v. McDearmon*, 5 Cold., 392.) The surety is regarded as

a trustee for the benefit of the creditor, and such trust subsists until the debt is paid, and may be enforced against any one taking the trust property with notice of its character. (*Eastman v. Foster*, 8 Met., 19; *Carpenter v. Brown*, 42 Miss., 28.) And it is held that the creditor would be entitled to a judgment confessed by the principal in favor of the surety after the surety had been discharged. (*Crosby v. Crafts*, 5 Hun., 327.) But it is held that where the indemnity fund or security given by the principal to the surety is "against a contingent liability," there can be no substitution in favor of the creditor until the liability has become absolute. "If a mortgage or other security is given to the surety, not to secure the debt or provide a fund for its payment, but to save harmless from a contingent liability or loss, that contingency must come or the injury be sustained before a right to the indemnity inures to the creditor." (Per *Simrall, J.*, in *Osborn v. Noble*, 46 Miss., 449.) It is also held that indemnity given by a stranger to the surety, or by a co-surety, cannot be claimed by the creditor by subrogation. (*Taylor v. Farmer's Bank*, 87 Ky., 398; *Hampton v. Phipps*, 108 U. S., 260.) Nor can the creditor be subrogated to personal indemnity given the surety, that is, not given as a pledge for the payment of the debt, after such surety has been discharged, since the possibility of the surety being damnified has ceased with his discharge. (*Constant v. Matteson*, 22 Ill., 546.)

THE END.

QUESTIONS FOR STUDENTS.

The questions are numbered to correspond with the sections in this book. The answers and references for further study may be obtained by referring to the corresponding sections.

NEGOTIABLE INSTRUMENTS.

Chapter I. The Subject Introduced and Defined.

746. Explain fully what is meant by "negotiable instruments." How do they differ from simple contracts at common law as regards assignment?

747. What may be said of the history of negotiable paper? What form of commercial paper was first used in England? What was necessary in England to establish the negotiability of promissory notes? Is there such a statute in your State?

748. State what is the purpose answered by negotiable instruments.

749. Name the different forms of commercial or negotiable paper.

750. Define a bill of exchange; explain the difference between foreign and inland bills.

751. Write out a bill of exchange with yourself as drawer. Explain who is drawer, drawee, payee, indorser, acceptor, indorsee, and holder.

752. Define a promissory note, and distinguish it from a bill of exchange.

753. Write out a promissory note with yourself as maker. Name and explain the different parties to a promissory note

754. Define a check, and distinguish it from a bill of exchange. Write out a check upon your local banker in the customary form.

755. Repeat the essentials of negotiability as given by Professor Walker.

756. Name the writers on Negotiable Instruments, or Commercial Paper.

Chapter II. Essentials of Bills and Notes.

757. What can you say as regards the bill or note being in writing; bearing date; and signature? What is meant by

ante-dating and post-dating, and what effect do they have upon the note or bill?

758. Is it necessary to give the name of the maker or drawer in the instrument? What will take the place of the name? If the signature of the maker is in the alternative what is the effect? Explain what is meant by, and distinguish between joint, several, and joint and several notes. What may be said as to the name of the drawee in the bill?

759. What is the effect if no person is stated as payee? May an instrument be made payable to bearer, or to a stated officer? If the name of the payee is left blank by whom may it be filled up?

760. In what must bills be payable, state fully? Is a note negotiable which calls for "gold coin" in payment?

761. What may be said about the validity of a bill when amount is payable in money of foreign denomination? What is meant by dollars and cents in the United States?

762. Where should the amount payable be stated? In case of a difference will the marginal figures or the words in the body of the instrument govern?

763. What can you say about the necessity of certainty in the sum payable?

764. Are notes written with "current exchange;" for the payment of attorney fees, or costs of collection, valid under the rule as to certainty in the amount payable? What is the effect of a stipulation allowing the holder to confess judgment against the maker on default?

765. What can you say as to the necessity of the sum being payable without conditions? Give examples of what are, and what are not, considered conditions attaching to the sum payable.

766. What is the general rule as to a note payable "on or before" a given date being negotiable? In part payments of installments?

767. What is meant by words of negotiability, and why are they necessary? What are the words ordinarily used to indicate negotiability? Are such words necessary by statute in your State?

768. Give other examples of words of negotiability.

769. What may be said as to the necessity of consideration for the bill, and its statement in the instrument?

770. What may be said as to inserting a place of payment?

771. What is the effect of a seal on commercial paper?

772. What is the necessity as regards witnesses to the signature of maker or drawer? What can you say as to the delivery of the bill? What is the presumption as regards delivery, and

how may this presumption be rebutted? What is an "escrow," and may commercial paper be so delivered?

773. What is the effect of notes and bills executed in blank? who may fill them up? Whom do they bind?

774. What in general is sufficient to constitute the promise to pay in a bill? Illustrate your answer.

Chapter III. The Parties.

775. What general rules apply to bills as regards the capacity of the parties to make them?

776. What can you say as regards commercial paper executed by an infant? Is the contract void or voidable? If the note was given for necessities what may be recovered? What is the effect when the infant is made payee? What is the effect of the ratification of such paper?

777. What can you say as to the validity of commercial paper executed by an insane person?

778. At common law what was the capacity of a married woman to execute a valid bill? What is the effect of modern statutes in this regard?

779. Can an Alien Enemy be a party to valid commercial paper? Why not?

780. State fully and explain when partners have implied power to execute commercial paper in the firm name. What is the effect of partnership paper improperly issued in the hands of a *bona fide* holder? What is the proper form of firm signature?

781. Into what general classes are corporations divided? Distinguish between the several classes of corporations. What governs the power of a corporation to issue commercial paper?

782. What is meant by "ultra vires" contracts? What is the effect of paper issued *ultra vires*? Explain fully. What is the implied power of a corporation to be payee or indorsee of a bill?

783. By whom may corporations be represented? Discuss the implied power of cashier, president, or secretary to act for the corporation. What may be said as to the proper form of a corporate signature? How must bills payable to a corporation be indorsed?

784. Discuss the power of public or municipal corporations to make and receive commercial paper. What is the better rule as to the extent of the implied power of a municipal corporation to issue negotiable paper for borrowed money?

785. Who has power to represent the municipal corporations in the issuing of commercial paper?

786. Discuss the power of Trustees, Guardians, and Executors to issue commercial paper in their representative capacity. What is their power to indorse or transfer the paper of the estate?

Chapter IV. The Consideration.

787. What is the general rule as regards a consideration for commercial paper?

788. Discuss the meaning of a valuable consideration, giving examples of such a consideration for a negotiable instrument. Give some examples of what are not valuable considerations.

789. Give instances of who are considered holders of commercial paper for value. What may be said as to the consideration when a note is taken for a pre-existing debt, or for collateral security? Mention the rules laid down by Mr. Daniel.

790. What is meant by a *bona fide* holder for value without notice? Give illustrations. What does notice include? What is the effect of a bill being overdue at the time of transfer? What is the status of a holder with notice who has taken from one without notice? What is meant by immediate parties; remote parties? What defenses are available against remote parties? How is privity between parties created?

791. Explain what is meant by accommodation paper. What rights has the accommodation party against the holder of the note to which he has become a party? What are his rights in such bill before its negotiation?

792. Discuss the effect of absence of consideration, or a failure of consideration, upon the note. When is partial failure a defense and against whom? What is the effect when the consideration is illegal? When void?

793. Explain and discuss the effect of fraud or duress upon the validity of the note affected with it. Who may retain a bill effected with fraud against the rightful owner?

Chapter V. Acceptance and Transfer Considered.

794. State the purpose of acceptance.

795. What is the meaning and effect of acceptance? Who becomes the primary debtor by acceptance?

796. State fully what bills must be presented for acceptance.

797. Discuss presentment for acceptance as regards, who may make, where, when, and within what time. What is meant by reasonable time? May the drawee demand to see the bill? What is the necessity of the presentment being final?

798. Give four cases in which presentment may be excused.

799. Discuss the acceptance as regards, who may accept, when he may accept, what the holder may require of the acceptor, and when the acceptance is completed so as to be irrevocable. What is the usual form of acceptance? When will an acceptance be implied?

800. Explain what is meant by, and discuss, acceptances for honor, or *supra protest*. What must the acceptor *supra protest* do to have recourse? If conditional acceptance is consented to by the holder, what must he do to hold other parties liable?

801. Explain and discuss fully presentment for payment. When is a bill dishonored by non-payment? When is presentment for payment unnecessary?

Transfer.

802. State generally, in what ways bills may be transferred.

803. Explain and discuss transfer by act of law.

804. Explain and discuss transfer by assignment. If indorsement is subsequently obtained, what governs as regards the time when it operates as a negotiation?

805. What is the meaning of transfer by negotiation, and what are the incidents and privileges as given by Benjamin in his edition of Chalmers's Bills and Notes? When is a bill negotiable?

806. Name and describe the two modes of negotiation. Where must the indorsement be written?

807. State the different kinds of indorsements. How may a blank or general indorsement be converted into a special one, and what is the effect?

808. Explain and discuss (a) qualified, (b) conditional, and (c) restrictive indorsements. What is the effect of the restrictive indorsement on the indorsee?

809. Who must negotiate the bill? Explain what is meant by the *de facto* holder.

810. To whom may a bill be indorsed?

811. When may a bill be negotiated? What is the presumption as to when it was negotiated?

812. What may be said as to the negotiation of overdue paper? When are bills payable in installments deemed overdue? In your State is a set-off or counter-claim an equity attaching to an overdue bill? When is lack of consideration for the transfer not an equity attaching to the overdue bill?

813. What does the indorser warrant on negotiation? What may be said as to the rights of the indorsee? What may be shown as against the *de facto* holder to defeat his suit? When and how may an action be maintained upon a lost bill?

Chapter VI. Duties of the Holder.

814. What are the general duties of the holder of a bill?

815. What is the rule to ascertain the proper date for presentment? Explain the effect of days of grace, or holidays on the date of maturity of the bill.

816. What may be said as to the mode of presentment?

Protest.

817. Explain the meaning and purpose of protest. What is the effect of failure to protest a bill?

818. Explain what is meant by noting for protest. Of what does the noting consist?

819. State what the certificate of protest should contain. Where should the bill be protested? What law governs in case of conflict?

820. What facts are evidenced by the notarial certificate? What, if any, statutes in your State in regard to this?

821. How may protest be waived or dispensed with?

822. Explain protest for better security; for dishonor *supra protest*.

Notice of Dishonor.

823. Explain and discuss the meaning and purpose of notice of dishonor. What is the effect of a failure to give due notice?

824. What are the elements of due notice? Describe each fully. When notice is properly given by the holder for whose benefit will it inure?

825. What is the rule as regards the time given a party other than the holder to give notice of dishonor? When is the drawee or acceptor deemed the agent of the holder to give notice?

826. State and explain the seven instances when notice of dishonor will be dispensed with as given by Benjamin in his edition of Chalmer's Bills and Notes.

827. What are the excuses for delay in the giving of notice?

828. By what laws is the instrument governed as regards notice of dishonor in case of conflict?

Payment.

829. What may be said as to the duty of the holder to accept payment and deliver the bill? How is payment distinguished from a sale or transfer of the bill?

830. State who may make or receive payment.

831. When is a payment properly made, and what is the effect of such a payment? When the payment is made by one other than the primary obligor what is its effect?

832. Give the three rules as to the application or appropriation of a payment when there are two or more bills held by the holder.

833. Explain and discuss when the payment by bill will be considered absolute or conditional. What is the effect of the conditional payment on the original bill? What are the duties of the holder as regards the bill taken in conditional payment?

Chapter VII. Liabilities of Parties and Special Forms of Discharges.

834. Explain and discuss the liability of the drawee to the drawer, and to the holder before acceptance.

835. Explain the liability of the acceptor to the holder. What is the acceptor precluded from denying as against a holder in good faith? For what is the acceptor liable by refusing to pay the accepted bill?

836. Explain and discuss fully the liability of the drawer or indorser to the holder. Who are considered indorsers generally? What is the indorser precluded from setting up as against the holder in good faith? What is the extent of indorser's liability on dishonor of the bill?

837. Explain and discuss what is meant by exchange and re-exchange. Are promissory notes within the rule as to exchange?

838. What may be said as to the rate of interest recoverable after maturity?

839. Discuss the liability assumed by a person who transfers a bill by delivery only. What facts does he warrant to the transferee?

840. What may be said of the liability of the person accommodated to the accommodation party?

841. What is meant by a discharge of a bill, and what will operate as such discharge?

842. What is mentioned as a discharge of a surety to a bill?

843. Explain what is meant by a forgery; by an alteration. What is the meaning of a spoliatio? What is the effect of a material alteration? Of an immaterial alteration? What may the holder who has materially altered a bill recover? When are *bona fide* holders protected from the effect of forgeries or material alterations?

844. At common law what is the time limit within which a suit can be brought on a bill? When does time begin to run as regards the various parties to the bill? What if any statute in your State in regard to the time within which suit may be brought on a bill?

Chapter VIII. Promissory Notes and Checks Specially Considered.

845. What can you say regarding the form and interpretation of a promissory note? Give examples of what are and what are not deemed promissory notes.

846. What may be said as to the negotiability of promissory notes? When will the note be deemed overdue?

847. Describe the liability of the maker of a promissory note. What does he warrant to the *bona fide* holder?

Checks.

848. Give Tiedeman's definition of a check. What is the effect of a check drawn against a bank in which the drawer has no funds? What is the usual form of a check? When is a check payable which is post-dated?

849. What is meant by a certified check? What change in the liability of the bank is made by its certifying a check? How, and by whom may checks be certified?

850. Are checks negotiable instruments? What is the effect of the payee adding his name to the check at the time of payment?

851. Explain the duties of the holder of a check as regards presentment for payment, notice of dishonor and protest. When will the drawer be discharged by failure to present for payment or to give notice of dishonor?

852. Give the rules governing the time within which the check must be presented for payment. What excuses may be alleged to excuse delay in presentment for payment?

853. When will a check not known to have been dishonored be deemed overdue? Give examples.

854. Explain who may draw checks against deposits.

855. When will death or bankruptcy of the drawer revoke a check?

856. Explain the rights and duties of the banker as regards the funds of depositors. What is the responsibility of the bank to these drawers in case funds are paid out on a forged indorsement? May the bank recover money paid to a person on an altered check? Give reason for your answer. What may be said as to the duty of the bank to know the signatures of its depositors? May the holder of a check sue the bank for a refusal to pay when in funds? Give reason for answer. May the bank offset an account against the holder of a check?

857. Discuss and explain the rights and liabilities of the drawer of a check. What becomes of the check when paid?

858. What is the general rule applicable when a check is given in payment of a debt?

Chapter IX. Paper Money, Coupon Bonds, and Quasi-Negotiable Paper.

859. Mention the various kinds of paper money in use in the United States, and give the general characteristics of such money as negotiable instruments. What does the transferor of a bank-note warrant?

860. Give Tiedeman's definition of a coupon bond. What is the nature of the coupon? Who may issue coupon bonds? What, in general, are the rights of a holder of a coupon bond?

861. Explain the method of transfer, presentment for payment and discharge of coupon bonds. After maturity, may interest be collected on the bond or coupon?

862. Who may bring an action on the bond? May the coupon be sued on? If the bond is invalid, may the original consideration be recovered? What defenses may be set up by a municipal corporation in an action on its bonds?

863. Explain what is meant by a certificate of deposit, and discuss its effect as a negotiable instrument.

864. What is meant by a bill of lading being quasi-negotiable? Explain fully the features of a negotiable instrument possessed by a bill of lading. What if any statute in your State regarding bills of lading as negotiable instruments?

865. Mention the negotiable characteristics of certificates of stock.

866. What may be said as to warehouse receipts possessing some of the features of negotiable paper? Are warehouse receipts negotiable by statute in your State?

867. Define and explain letters of credit and circular notes.

THE LAW OF SURETYSHIP AND GUARANTEE.

Chapter I. The Contract Defined and Explained.

868. Define Suretyship and Guaranty; and explain and distinguish between them. Which is bound with the principal?

869. What may be said of the essentials necessary to the contract of suretyship or guaranty? What can you say of the antiquity of such contracts?

870. In general, who may become sureties or guarantors? In case an individual becomes a surety contrary to a statute or rule of court will his obligation be binding?

871. State whether or not a consideration is necessary to the contract of guaranty or suretyship. Discuss what will and what will not be deemed a sufficient consideration to hold the surety or guarantor.

872. What is the effect of a bond given when not required, or in a different form from the one prescribed? Illustrate.

873. When may the name of the surety be left from the written obligation and he still be bound? When will the contract of suretyship or guaranty be implied?

874. When is parol evidence admissible to show that a party of a joint or joint and several note is a surety? If the creditor knows of the fact of suretyship and does an act that would discharge surety, what is the effect? What is the rule as to the admissibility of parol evidence where the party has added "surety" to his name? Where he has added "principal?"

875. Give the general rule as to the surety being estopped to deny recitals of fact in his written obligation.

876. Discuss the principles governing the question of the negotiability of guaranties.

877. Explain when an offer of guaranty must be accepted, and when it will be deemed unnecessary.

878. What may be said as to the form or character of the guaranty? May it be oral? How is it determined whether or not a guaranty is continuing or not? Give illustrations.

879. Discuss the limitations which apply to the surety's contract as regards time, act or amount. Give illustrations.

880. Give the section of the statute of frauds that affects the contract of the surety or guarantor. Discuss the principles governing the question whether the contract is within or without the statute of frauds. Illustrate when the contract must be in writing, and when it need not be in writing. Where the surety promises to pay the debt of another from such other's property, need the contract be in writing?

881. Explain the effect on the surety's contract when it is within the statute of frauds, and not in writing. When may a part of an oral promise be valid?

Chapter II. Liability of Surety or Guarantor—How Discharged, Etc.

882. What is the general rule as to the interpretation of the contract of the surety or guarantor? What may be said as to guarantor and surety being favorites of the law? When will the contract have a retroactive effect?

883. When may the surety or guarantor be sued with the principal, and before the creditor's remedies against the principal are exhausted? What was the Roman Law on this question? When the guaranty is to insure the collection of a debt, or of the collectibility of a note, what must the creditor do before suing the guarantor?

884. Explain the meaning of due diligence as applicable to

the action of the creditor in attempting to collect from the principal. What will excuse delay on the part of the creditor in proceeding against the principal? When is he excused from looking to the principal?

885. Explain fully the liability of the surety for the payment of overdue notes, and for the rent of a tenant who holds over. Illustrate.

886. In general, what is the extent of the surety's liability for a debt or on a bond? When may he be charged with interest?

887. State the extent of a surety's liability for a discounted note. If the note signed by the surety is diverted from its purpose, what is its effect?

888. Explain and discuss the liability of the surety on general and particular guaranties. Give illustrations. What is the effect of a guaranty given to one and acted on by several? Bound for several and credit is given to one? What is the general rule as to the extent of the surety's obligation?

889. Give special illustrations of the liability of the surety.

890. Explain when the death of the guarantor or surety will revoke the contract. When will the death of the guarantor revoke a continuing guaranty?

891. Explain when the surety may be sued jointly with the principal. When he cannot be sued jointly.

892. Give instances when a court of equity will charge a surety not chargeable at law. When it will not.

893. The law of what place governs the liability of the surety?

894. What is the effect on the liability of the surety when the principal is not bound, or is discharged? What distinction is made as regards the reasons which discharge the principal? If the surety is indemnified, will he be discharged?

895. What may be said as to the necessity of demand on the principal for payment, and notice of default to the guarantor? What is said of the necessity of demand and notice where the guaranty is absolute? When is notice and demand unnecessary? What notice must be given when necessary, and within what time?

896. Discuss the rules applicable to determine the liability of blank indorsers and accommodation parties to commercial paper. To what extent is parol evidence admissible in such cases?

897. In general, what are the methods by which surety or guarantor may be discharged from his obligation?

898. Explain and discuss the discharge of the surety by payment of the debt for which he was responsible. What effect

has a valid tender of the amount of the debt in money upon the liability of the surety?

899. Explain and discuss fully the discharge of the surety by the creditor giving time to the principal; as regards, 1, the consideration; 2, the time.

900. State some exceptions when the surety is not discharged by the creditor giving time to the principal. When will the taking of a new note for the debt of the principal discharge the surety? Will the taking of collateral security by the creditor discharge the surety? What must the surety set up to be discharged?

901. Explain and discuss fully the discharge of the surety or guarantor by the creditor altering the contract of the surety. Give illustrations of alterations working a discharge of the surety. Of alterations not working a discharge.

902. Discuss and explain fully the discharge of the surety by fraud, misrepresentation or concealment, and the like on the part of the creditor, or by the principal with the knowledge and consent of the creditor. Give illustrations.

903. Discuss and explain the discharge of the surety by the creditor relinquishing securities obtained from the principal for the payment of the debt. What is the status of a creditor holding a pledge or lien on property of the principal? Will the surety be discharged *pro tanto* in case the security released is less than the amount of the debt? Give examples.

904. When will the negligence or carelessness of the creditor in dealing with collateral security for the debt discharge the surety? Give examples.

Chapter III. Of the Rights of Sureties and Guarantors— Contribution and Subrogation.

905. Mention the rights of sureties and guarantors.

906. Who is the real debtor in the contract of suretyship? What promise is implied from this real debtor? When does the surety have an action for indemnity against the principal? Is demand or notice necessary prior to suit? How may the debt be paid by the surety? In case of a compromise of the debt by the surety, what amount can he recover from the principal? Can he recover costs? Consequential damages?

907. If the surety pays in installments, what are his rights? When does the surety's right to indemnity commence as against the principal's demand of exemption or the claims of third parties? What are the rights of a volunteer surety? Of the surety after the principal has been discharged in bankruptcy? What are the surety's rights in equity before paying the debt of the

principal? If the principal was not liable and the surety pays may he recover indemnity? May the claim of the surety for indemnity be barred by the statute of limitations? When does the statute begin to run?

908. Explain and discuss the rights of the surety as against the creditor. In your State is there any statute authorizing the surety to notify the creditor to commence proceedings against the principal?

909. Explain the nature of the rights of surety or guarantor as against third persons.

910. What is meant by the right to contribution? What is a pre-requisite to the enforcement of contribution?

911. Explain who are considered co-sureties. Give illustrations. To what extent may parol evidence be used to charge or release one from contribution as co-surety? When will the surety be denied the right to enforce contribution from the co-sureties?

912. If one of the sureties becomes the principal, what is the effect? If the principal or co-surety is not liable for the debt paid by the surety what is the effect? If indemnity is taken by one co-surety to whose benefit will it inure? Does it matter whether such indemnity is taken before or after the debt is paid?

913. Mention the other equitable rights of the co-surety before paying the debt. How is the amount recoverable by the surety who pays the debt from each of the co-sureties determined? What is the rule where the sureties are bound in different amounts for the same obligation? Where may the suit for contribution be brought, and who are proper parties?

914. What is the nature of subrogation? Explain fully what is meant by the right to subrogation. To what extent is the rule that payment discharges a debt modified by the principle of subrogation?

915. Who is generally entitled to subrogation? How may the right be defeated? What is necessary to be done before it may be enforced?

916. If denied by the creditor, how may the right to subrogation be enforced by the surety?

917. Must the whole debt be paid before the right to subrogation is complete? When will the right not be allowed? Why is not collateral security held by the creditor discharged by the payment of the debt by the surety? What is the effect of taking a separate indemnity on the right to subrogation? May the surety paying enforce the rights of the creditor against a co-surety under the principle of subrogation?

918. Explain the holdings of the authorities as regards the

right of a surety paying the debt after it has been reduced to a judgment to be subrogated to the position of the creditor as regards such judgment.

919. Does the right to subrogation cover all the securities held by the creditor? How is this question settled in England? What are the sureties' rights in a mortgage held by the creditor as security, under the principle of subrogation? Is the surety of a surety entitled to subrogation? What effect will notice of the surety's right to subrogation have when third persons take the property held by the creditor as collateral, with knowledge of its character? What may be said of the right to be subrogated to securities and remedies by sureties for administrators, guardians, and the like?

920. Explain and discuss the right of the creditor to be subrogated to securities held by the surety from the principal. What is the rule when such security is given the surety to indemnify him from a contingent liability? If the surety receives the indemnity from a stranger, can the creditor claim subrogation?

UC SOUTHERN REGIONAL LIBRARY FACILITY



AA 000 718 219 9

